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Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT L. VERA CRUZ,
Petitioner,

vs.

CITY OF ESCONDIDO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below erred by holding that the use of a police dog to "seize" a misdemeanor suspect by inflicting life-threatening bite wounds causing permanent injuries was not "deadly force" under *Tennessee v. Garner* because it was not force "reasonably likely to kill," notwithstanding the fact that the Model Penal Code's definition of "deadly force" as force creating "a substantial risk of causing death or serious bodily harm" urged by petitioner has been accepted by every other circuit court to consider this issue and by law enforcement agencies across the country as the proper definition of "deadly force."

PARTIES TO THE PROCEEDINGS

Petitioner Robert L. Vera Cruz was the plaintiff in the district court and appellant in the Court of Appeals for the Ninth Circuit. Before the district court, defendants were respondent City of Escondido and three of its police officers, Police Chief Vincent Jimno, Sergeant Corey Moles, and police dog handler Eric Distel. The individual defendants were later dismissed on stipulation or pursuant to qualified immunity. Respondent City of Escondido was the only appellee before the Court of Appeals for the Ninth Circuit and is the only respondent in this Court.

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Petitioner Robert L. Vera Cruz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The final opinion of the Court of Appeals for the Ninth Circuit, as amended, is reported at 139 F.3d 659 and is reprinted in the Appendix to this petition at 1a. ("Pet. App.") The original opinion of the Court of Appeals for the Ninth Circuit is reported at 126 F.3d 1214, and is reprinted in the Appendix at 17a. The Order amending the original opinion and denying the petition for rehearing and suggestion for rehearing *en banc* is reprinted in the Appendix at 12a. The judgment on the special verdict in the district court is unreported and is reprinted in the Appendix at 25a.

JURISDICTION

The Ninth Circuit issued its initial opinion on October 3, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by petitioner. The Ninth Circuit issued its amended opinion on March 31, 1998. By order dated March 31, 1998, petitioner's petition for rehearing and rehearing *en banc* was denied. Pet. App. 12a. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND PENAL CODE PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Model Penal Code ("MPC"), at Section 3.11(2) (1985), defines deadly force as:

> force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force.

STATEMENT OF THE CASE

At issue in this case is whether the police may constitutionally deploy a dog to bite a misdemeanor suspect in order to "seize" the suspect in the absence of probable cause to believe that the suspect poses a threat of serious injury to the police or others, where such dogs are trained to bite suspects in a manner that is substantially likely to cause intense pain and serious bodily injury, but where such bites are not necessarily "reasonably likely" to kill (assuming adequate and prompt medical treatment). The Ninth Circuit authorized the use of such dog bites to "seize" suspects in such circumstances, notwithstanding the substantial risks of serious bodily harm so graphically illustrated by the facts of this case.

1. This case involves the mauling of petitioner by a police dog unleashed against petitioner by City of Escondido officers on January 1, 1992. Petitioner was, at most, a misdemeanor suspect when the Escondido police deployed a dog to "seize" him. Petitioner received life threatening and permanent injuries as a result of the dog bites he received. He was never charged with any criminal offense arising out of this incident.

Before his encounter with the Escondido police, petitioner had been involved in an argument with employees at a Del Taco restaurant after being refused food. RT 506-507. A 10:24 p.m. radio dispatch reported a white male was trying to kick in the doors of a Del Taco restaurant. ER 216, 254. Two police units were dispatched to respond to this call. Officer Distel, an Escondido police dog handler, arrived first with his dog and located petitioner standing outside the open rear door of Del Taco under an overhead light. ER 254. According to Distel, petitioner appeared to be intoxicated. While the dog handler saw that

Vera Cruz had strapped on his hip a knife in a sheath, the dog handler conceded that Vera Cruz carried the knife lawfully and had not threatened anyone with it.

According to the officers on the scene, petitioner turned and walked away from Officer Distel, who was approximately fifty feet away from petitioner at the time, and began running once the officer removed the dog from his patrol car and threatened to release the dog. ER 254-255. At this point, Officer Distel released the dog and it chased petitioner and then administered the bites which nearly severed petitioner's arm. ER 255. The dog bit petitioner's arm, causing a five-inch long tear, cutting his biceps in two and partially severing his triceps. RT 225-226.

Petitioner was handcuffed and taken into custody and transported to Palomar Medical Center where he was treated for his wounds. Petitioner endured major surgery and was hospitalized for eight days. RT 477. He was unable work for nine months. RT 486. Even the City conceded that petitioner's "pain and suffering were obviously intense . . ." RT 205-206.

Although the evidence regarding the incident was disputed in some respects at trial, a reasonable jury would have had ample evidence to conclude that no reasonable police officer would have believed that petitioner posed any threat of death or serious bodily injury to the officers or others in these circumstances. Rather, the officers involved admitted that Vera Cruz posed no threat of death or serious bodily injury to them or others.

2. Escondido uses its dogs as weapons to "seize" persons by attacking and biting. Both sides' experts testified at trial that the dogs were trained to bite any part

of the body they can reach, and to bite has hard as they can, with a full mouth, for as long as the dog can. RT 385-386. Thus, the dog's teeth "frequently penetrate deeply." RT 316-317. It was not unusual for bones to be broken, RT 317, or for infections to develop. RT 314-315.

Professor James Fyfe, one of the experts relied upon in *Tennessee v. Garner*, 471 U.S. 1, 12 n.10 (1985), and a nationally prominent expert on police use of force, testified as an expert witness at trial for petitioner on the issue of the nature of the risks associated with the use of police dogs. He testified about a study he performed in which 37% of all police canine bite victims required in-patient hospitalization. This study showed that a police dog attack like the one on petitioner was likely to cause serious injuries and that petitioner's injuries were neither freakish nor aberrational.

3. Petitioner's theory of the case at trial was that by deploying a large dog trained to bite suspects in a manner highly likely to cause intense pain and serious injury, the officers had employed "deadly force" on him in violation of the restrictions on police use of such force enunciated in *Tennessee v. Garner*.

Petitioner contended that the use of police dogs against suspects in petitioner's position, especially given the way the City of Escondido's dogs were trained and deployed, created a substantial risk of death or serious injury within even the Escondido police department's definition of "deadly force" -- that force "which may result in serious injury or death." This is, and was at the time petitioner was attacked, the generally accepted definition of "deadly force" used by law enforcement agencies throughout the country. It is also the definition used by the Model Penal Code and the definition used in every

published decision that has considered this issue prior to the Ninth Circuit's decision here.

Petitioner sought jury instructions reflecting this theory of the case.[1] The district court rejected petitioner's request for a deadly force instruction under *Tennessee v. Garner*. RT 1041, AER 195. The jury instruction sought by petitioner would have informed the jury that "[a] police officer may use force which creates a substantial risk of causing serious bodily injury only when the police officer has probable cause that the subject poses a significant immediate threat of death or serious physical injury to the officers or others." ER 208. Other related jury instructions further defined the terms "serious bodily injury," ER 209-210, and "deadly force," ER 211.

The requested jury instruction defining "serious bodily injury" provided as follows:

> JURY INSTRUCTION NO. 60
> (Serious Bodily Injury -- Defined)
>
> "Serious bodily injury" refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm. Serious bodily injury means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound

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[1] Petitioner also moved for a new trial on this basis. ER 261. This motion was denied. ER 264.

requiring extensive suturing; and serious disfigurement. Injury which causes significant pain and requires considerable time to heal can be serious bodily injury. Multiple abrasions or lacerations or contusions can be serious bodily injury. Reasonable possibility of serious infection is serious bodily injury.

An instrumentality inflicting serious bodily injury is not limited to a gun or a knife. For example, striking with the hand or fist, kicking, choking, biting, or other comparable means may constitute force reasonably capable of causing serious bodily injury.

To establish that the force used was reasonably capable of causing serious bodily injury, it is not necessary to show that serious bodily injury was actually inflicted. It is only necessary to show that the force used was reasonably capable of causing serious bodily injury.

In determining whether an injury constitutes serious bodily injury as that term is defined herein, it is irrelevant that medical treatment will alleviate or prevent permanent disability caused by the injury.

The requested jury instruction on "deadly force" provided as follows:

JURY INSTRUCTION NO. 63
(Deadly Force -- Defined)

"Deadly force" means that force which creates a substantial risk of causing death or serious bodily harm.

The jury, deliberating without a "deadly force" instruction, found that Officer Distel, the dog's handler, did not use excessive force. Because the district court had found that the use of the dog on petitioner was not "deadly force" as a matter of law, the jury was not permitted to reach the issue whether the City of Escondido was responsible for petitioner's injuries because the city maintained a policy allowing the use of the dog in these circumstances to inflict these kinds of injuries. This was the basis for petitioner's appeal in the Ninth Circuit against the City of Escondido.

4. The Ninth Circuit rejected petitioner's argument that "deadly force" should be defined as it has been in the MPC and in police department policies across the country and held that deadly force under *Tennessee v. Garner* means, "force reasonably likely to kill." Pet. App. 3a. The Ninth Circuit recognized that other circuits "do seem to have adopted the MPC's definition of deadly force . . ." Pet. App. 8a. However, the court suggested that all of these other courts did so in the context of records different from the record presented in this case. *Id.*

The Ninth Circuit found that the MPC's definition was "inapposite" to Fourth Amendment concerns in that the MPC was designed to serve different purposes. Pet. App. 7a. In particular, the Ninth Circuit expressed a reluctance to equate police officers with criminals to which the MPC's

definition of "deadly force" is applied in other contexts. The Ninth Circuit further reasoned that the MPC's consideration of subjective intent was at odds with the objective analysis required under *Graham v. Connor*, 490 U.S. 386, 397 (1989). Pet. App. 7a.

The Ninth Circuit suggested that all of the courts which had adopted the MPC's definition, and presumably all of the law enforcement agencies across the country which have done the same, did so for lack of a better definition, Pet. App. 8a, as opposed to the recognition that the MPC definition reflects the balancing of the competing relevant interests that most faithfully implements the commands of the Fourth Amendment.

The Ninth Circuit believed that this Court's reasoning in *Tennessee v. Garner* would have been different if the force used by the police there would only cause serious bodily injury rather than death. Pet. App. 9a. The court seemed to believe that defining "deadly force" under *Garner* in a way that included a substantial risk of "serious bodily injury" would subject almost any use of force to the *Garner* standard. Pet. App. 10a.

In light of the undisputed evidence that the use of a police dog was not "reasonably likely to kill" a suspect the Ninth Circuit affirmed the judgment below.

REASONS FOR GRANTING THE WRIT

In *Tennessee v. Garner*, this Court placed limits on the police use of "deadly force" holding that such force could be constitutionally employed only to "seize" felons who the officer had probable cause to believe presented a significant threat of death or serious injury to the officer or

others. 471 U.S. at 3. This Court did not define "deadly force" in *Tennessee v. Garner* because it had no need to. The force used in that case, a gunshot, was obviously deadly force.

While the facts in *Garner* concerned a shooting death, until *Vera Cruz, Garner* has never been read as being limited to weapons "reasonably likely to kill." To the contrary, police agencies and the decisional law treated *Garner* as applying to any use of deadly force as defined by the Model Penal Code or its equivalent. Thus, until *Vera Cruz*, there was a national consensus that deadly force was not limited to force likely to kill but included force substantially likely to cause "serious bodily injury." The Ninth Circuit's new formulation has no apparent roots in any decision of this Court, or any other court, and is significantly narrower than the definition of "deadly force" actually employed by law enforcement agencies across the country.

This case arises under the "serious bodily injury" prong of the MPC definition of "deadly force" and it is this prong the court below found inapplicable to the Fourth Amendment's limitations on the use of force. Under the Ninth Circuit's view, the fact that a reasonable police officer would know that the use of a police dog was likely to cause "serious bodily injury," including the gruesome injuries suffered by the petitioner here, does not call for any special Fourth Amendment limitation on the use of such force. Thus, as here, such force may be used against a fleeing misdemeanor suspect who poses no threat to the officer or others.

Under the Ninth Circuit's ruling, *Garner* is newly limited to that small category of police weapons reasonably likely to actually kill a fleeing suspect -- flesh-tearing dog

bites, capable of rendering life-long disability, are now subject in the Ninth Circuit's view only to the generic standard of *Graham v. Connor*. Under the Ninth Circuit's decision, misdemeanant or felon, armed or not, a suspect may be permanently disfigured so long as it is objectively necessary to bring him or her under the officer's control, whether or not the suspect poses any threat to the safety of the officer or others. The Ninth Circuit's decision reads *Tennessee v. Garner* much too narrowly and threatens to destabilize the national consensus on the definition of "deadly force" in a way that threatens community safety, rather than enhances it.

The circuit courts are now split on that issue of urgent national importance. The intervention of this Court would establish clear national standards, either the standards already widely accepted by the courts and law enforcement agencies and urged in this case by petitioner, or the newly minted standard adopted by the Ninth Circuit.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, ALL OF WHICH HAVE ADOPTED THE MODEL PENAL CODE'S DEFINITION IN DEFINING DEADLY FORCE FOR FOURTH AMENDMENT PURPOSES.

The Ninth Circuit's decision is the *only* decision below to reject the MPC formulation on the limits on the use of deadly force, a definition accepted by the City of Escondido, law enforcement agencies across the country and all of the courts that have previously considered this issue. Thus, the decision below has great potential to destabilize the settled national understanding of the

limitations on police use of deadly force widely accepted by law enforcement agencies and in existing Fourth Amendment jurisprudence after this Court's decision in *Tennessee v. Garner*. Indeed, respondent's counsel on appeal was quoted as saying: "I am going to put the word out on the Internet when I go home. I am going to recommend to all my clients that they *change* their definition of deadly force." Los Angeles Daily Journal, Oct. 6, 1997, at 3 (emphasis added).[2]

In determining what forms of police use of force must satisfy the requirements for the use of "deadly force" under the *Tennessee v. Garner* standard, courts have employed the Model Penal Code's definition of force that a police officer would know "creates a substantial risk of causing death or serious bodily harm." This standard, especially in the context of an ordinary misdemeanor arrest such as occurred here, is designed to avoid the grossly disproportionate use of force that led to petitioner's debilitating injuries in circumstances where less dangerous measures are clearly warranted. The Ninth Circuit's new standard, especially in the context of the use of police canines, authorizes the use of a weapon that is capable of imposing horrific injuries on members of the community in

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[2] Underscoring the critical need for clarity in this area is the position of police dog organizations themselves, which promote the professional use of canines in law enforcement. These groups have noted the importance, in their educational materials, of the decision below on the use of force. (Oregon Police Canine Association, <http://www.opca-.wom/veracruz.html>; K9 Tactics, http://www.-k9tactics.com/index.html; K9 Academy For Law Enforcement Case Law Center, <http://www.best.com/~policek9/-caseindx.htm>; United States Police Canine Association, <http://www. minn.net/uspca/ patrolcaselaw.htm>).

circumstances where such injuries are clearly disproportionate to any legitimate law enforcement objective.

The Eleventh Circuit in *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985), rejected the definition later advanced by the Ninth Circuit in this case. In *Pruitt*, the defendant city argued its officer had not used deadly force even though he intentionally shot the suspect because the officer "had not tried to kill Pruitt but, rather, only shot to stop him by hitting his legs." 771 F.2d at 1479 n.10. The Eleventh Circuit held that the Model Penal Code deadly force definition, in particular, the prong concerning "serious physical injury," properly defined deadly force "in the constitutional sense." Consequently, that court held that the officer, by shooting at the suspect's legs, used deadly force because the shooting was "force capable of causing *serious bodily injury*." 771 F.2d at 1479-80, n.10 (emphasis added).

In *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the Sixth Circuit adopted the MPC definition in a police dog bite case, as identifying the factors a court should consider in evaluating a use of force under *Tennessee v. Garner*. *Id.* at 912 (stating that the MPC definition of deadly force was a "useful statement of the two factors most relevant to the determination of whether the use of a particular law enforcement tool constitutes deadly force."). *See Mathews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994) (reaffirming validity of approach in *Robinette* and the use of the Model Penal Code definition of "deadly force").

The *Robinette* court drew no distinction between the risk of ensuing death and the risk of causing serious bodily

injury. The Sixth Circuit found, on the record in that case, that the use of a police dog to apprehend a felony suspect did not carry with it a "substantial risk of causing death or serious bodily harm," even though the suspect did die in *Robinette*.

The Third Circuit also affirmed the use of a "deadly force" instruction based upon the MPC definition and *Garner* in a § 1983 action involving a police dog attack in *Marley v. City of Allentown*, 774 F. Supp. 343 (E.D. Pa. 1991), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1992), in the context of the "seizure" by biting of a fleeing misdemeanor suspect.

In *Ryder v. City of Topeka*, 814 F.2d 1412, 1416-1417 (10th Cir. 1987), the Tenth Circuit reaffirmed that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." The *Ryder* court emphasized that "deadly force does not occur only when the suspect actually dies," and noted that "[s]everal courts have adopted the Model Penal Code definition of deadly force." 814 F.2d at 1416 n.11.

In *Mathis v. Parks*, 741 F. Supp. 567 (E.D.N.C. 1990), the court found a fullforce blow to the abdomen using the knee was "deadly force" because such force may "cause serious bodily harm." 741 F. Supp. at 572 and n.3.

The Eighth Circuit employed the MPC formulation in *Mattis v. Schnarr*, 547 F.2d at 1007, 1009 n.2 (8th Cir. 1976) (*en banc*), *vacated as moot sub nom*; *Ashcroft v. Mattis*, 431 U.S. 171 (1977), describing "deadly force" as "such force as under normal circumstances poses a high risk of death or serious injury to its human target, regardless of

whether or not death, serious injury or any harm actually results in a given case." *Id.* at 1009.

Even the Ninth Circuit had previously supported the MPC definition of deadly force as the appropriate standard to determine whether an application of force by the police had to meet the *Tennessee v. Garner* standard. In *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995) a different panel of the Ninth Circuit found that the prior decision in *Chew v. Gates*, 27 F.3d 1432, 1453 n.4, (9th Cir. 1994), "suggests that it ['deadly force'] might be defined as a 'force that creates a substantial risk of causing death or serious bodily harm.'" 47 F.3d at 1014.[3]

Although *Fikes* held that the dog that bit the plaintiff did not create a "substantial risk of causing death or serious bodily harm," 47 F.3d at 101, it used the MPC standard and not the "reasonably likely to kill" standard created by the court below to make the determination on deadly force. *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996) also found that use of a police dog did not meet the MPC standard for deadly force, while recognizing the importance of the standard in making this determination, 84 F.3d at 357.

Significantly, each of these cases employs the MPC definition, including force which is likely to cause "serious bodily injury" in the definition of "deadly force." None of these cases limited the concept of "deadly force" to force which is "reasonably likely to kill," as the Ninth Circuit did in this case.

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[3] In *Chew*, former Los Angeles Police Chief Daryl Gates gave deposition testimony that he was "'very much' aware that such bites could be fatal," 27 F.3d at 1441.

II. THE DECISION BELOW IS AT ODDS WITH THIS COURT'S DECISION IN *TENNESSEE v. GARNER* AND THREATENS THE STABILITY OF WELL-ESTABLISHED NATIONAL STANDARDS GOVERNING THE POLICE USE OF DEADLY FORCE.

The definition of "deadly force" under *Tennessee v. Garner* in the context of police uses of force other than shooting, is an issue of immediate national importance. The facts of this case graphically demonstrate the risk to life and limb posed by the Ninth Circuit's narrow view of "deadly force."

"There is general agreement [among police agencies] that the term [deadly force] means force reasonably capable of causing death or great bodily harm." W.Geller & M.Scott, "Deadly Force: What We Know," 23 (Police Executive Research Forum 1992) ("Deadly Force"). Indeed, this was the policy in the City of Escondido and generally in California at the time of this incident. *See, e.g., People v. Nealis*, 232 Cal.App.3d Supp 1, 283 Cal.Rptr. 376, 378 (1991). The International Association of Chiefs of Police ("IACP") in its Model Policy for the use of force, deadly and non-deadly, defines "deadly force" as "[a]ny use of force that is likely to cause death or *serious bodily harm.*" *Deadly Force, supra*, at 478 (emphasis added).

This Court stressed the relevance of actual department policies in defining the Fourth Amendment limits on the use of force. *Tennessee v. Garner*, 471 U.S. at 19-20. The Ninth Circuit's formulation --- "reasonably likely to kill" --- if accepted, would undermine the extensive national consensus on the definition of "deadly

force" and would inevitably result in an increase in the incidence of deaths and serious bodily injuries caused by the police in a wide range of police encounters with members of the community.

The Ninth Circuit justified its definition of "deadly force" by citing *Garner*'s statement on the "self-defeating" nature of using deadly force to set in motion the criminal justice system. 471 U.S. at 10. From this Court's statement, the Ninth Circuit interprets *Garner* as concerned only with force reasonably likely to cause death. However, this Court's reasoning in *Garner* supports using the MPC definition. Using force that is likely to cause serious bodily injury, although not as likely to cause death as a firearm, to seriously injure and permanently maim a non-dangerous fleeing misdemeanor suspect, amounts to punishment summarily imposed out of proportion to the crime which prompted police intervention. This case is a good example. Petitioner was never charged with any crime but he suffered permanent injuries as a result of the dog bites he received.

The facts of this case show graphically the grave and immediate risks to the public posed by narrowing the definition of "deadly force." Petitioner suffered extremely severe, life threatening and debilitating injuries because of the dog bites he received, while he was never charged with any crime and, indeed, was chargeable by the police in these circumstances with no greater crime than public drunkenness, if one takes the police reports at face value.

Medical testimony from petitioner's expert witness, Dr. Meade, demonstrates that police dog bites are a threat to human life, not only because of their great potential for infection but also because of the permanent and severe injuries they cause. ER 124.

One reason the Ninth Circuit rejected the applicability of the MPC's definition of "deadly force" is that the MPC is designed to govern criminal liability and police should not be governed by the same standards. Pet. App. 7a. The applicability of the MPC's definition, however, does not equate police with criminals, or suggest that police conduct is governed by the same standards in all circumstances. Moreover, the people against whom police dogs are deployed are not "criminals;" at most, they are persons the police suspect to have been involved in some criminal activity. In many cases, as was the case here, no criminal charges are ever filed against such persons. The standards governing the police use of force which has the likely capacity to cause the kind of permanent, disfiguring injuries petitioner suffered here cannot depend on the notion that all persons against whom the police deploy dogs are "criminals."

The use of the MPC definition by courts and law enforcement agencies is not based on equating the police and criminals; it is based on the understanding that the MPC definition best embodies a fundamental proportionality principle embedded in the Fourth Amendment. This principle is implicated when the police use of force is substantially likely to cause serious bodily harm, just as it is implicated by the police use of firearms which are more likely to kill.

The Ninth Circuit's concern that the MPC definition incorporated a subjective element at odds with the Court's decision in *Graham v. Connor* is misplaced. Petitioner's proposed jury instructions did not focus on the officers' subjective intent; the proposed instructions were fully consistent with the approach taken by this Court in both

Tennessee v. Garner and *Graham v. Connor*.[4]

The MPC definition has been found by the majority of courts that have considered this question to be the standard that most clearly articulates the fundamental proportionality principle this Court mandated in *Tennessee v. Garner*. *See, e.g., Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (Eleventh Circuit uses MPC definition and therefore holds that force likely only to cause serious injury is still "deadly force" in the constitutional sense" under *Garner*.). Any less restrictive standard will ineluctably lead to an increase in deaths and serious physical injuries inflicted by police officers in situations in which the use of such force is not justified.

The Ninth Circuit rejected the traditional definition because "almost any use of force is potentially deadly: A suspect may slip, fall and sustain a lethal head injury, even though the police used only moderate force; a small cut, if left untreated, might become infected and cause death." 139 F.3d at 661. Yet the MPC definition petitioner sought in his proposed jury instructions -- and as used by other courts -- forecloses this possibility. The force must present a *substantial* risk of death or serious injury. Petitioner's proposed instructions on "serious bodily injury" would not reach moderate use of force which results in unforeseeable or aberrational injuries.

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[4] The MPC definition defines "deadly force" by reference to the actor's "purpose" and knowledge. The rejected jury instructions make no reference to the officer's intent. The instructions define "deadly force" as force which objectively creates a "substantial risk of causing death or serious bodily injury."

The basis of petitioner's claim here, and the proof introduced by petitioner at trial, is that the use of police dogs to bite suspects regularly results in serious injuries of a kind that must be analyzed under the more restrictive Fourth Amendment standard in *Tennessee v. Garner*.

The likelihood of such injury in the context of the use of police dogs trained to "bite hard," as was the case in Escondido, is so great and the potential injuries so grave that the principles in *Tennessee v. Garner* should be applied to limit the use of such dogs to situations in which "deadly force" is appropriate. This Court should take this opportunity to revisit *Tennessee v. Garner* in a non-shooting context, so that the constitutional principles applicable in these circumstances are clear and uniform throughout the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul L. Hoffman*
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Santa Monica, CA 90401

Counsel for Petitioner
Robert L. Vera Cruz

*Counsel of Record

APPENDIX A

APPENDIX A

Robert L. VERA CRUZ, Plaintiff-Appellant,

v.

CITY OF ESCONDIDO; Vincent Jimno, Chief; James Malandra; Robert Benton; Stephen Skuba; Eric Distel; Corey Moles, Sgt.; Does 1 through 200, inclusive, Defendants-Appellees.

No. 95-56782.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 11, 1996.

Decided Oct. 3, 1997.
As Amended on Denial of Rehearing and Rehearing En Banc March 31, 1998.

Individual who was injured by police dog brought civil rights action against police officer. The United States District Court for the Southern District of California, Napoleon A. Jones, J., entered judgment in favor of officer, and appeal was taken. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) "deadly force," for purpose of Fourth Amendment restrictions on police conduct, means force reasonably likely to kill, and (2) police officer did not use deadly force in violation of the Fourth Amendment when he used police dog to apprehend a fleeing suspect.

Affirmed.

Hawkins, Circuit Judge, concurred in judgment.

Opinion, 126 F.3d 1214, superseded.

[1] ARREST k68(2)
35k68(2)
"Deadly force," for purpose of Fourth Amendment restrictions on police conduct, means force reasonably likely to kill. U.S.C.A. Const.Amend. 4.
See publication Words and Phrases for other judicial constructions and definitions.

[2] ARREST k68(2)
35k68(2)
Model Penal Code's definition of deadly force did not apply in determining whether police officer used deadly force in violation of Fourth Amendment when he apprehended fleeing suspect with police dog. U.S.C.A. Const.Amend. 4.

[3] ARREST k68(2)
35k68(2)
Police officer did not use deadly force in violation of Fourth Amendment when he used police dog to apprehend fleeing suspect, even assuming that properly trained police dog could kill a suspect under highly unusual circumstances; prospect of such aberration did not convert otherwise nondeadly force into deadly force. U.S.C.A. Const.Amend. 4.

*660 Donald W. Cook, Los Angeles, California, for plaintiff-appellant Robert L. Vera Cruz.

Jeffrey R. Epp, David R. Chapman, City Attorneys, Mark A. Waggoner, Assistant City Attorney, Office of the City Attorney, Escondido, California, for defendants-appellees City of Escondido, Sgt. Corey Moles, Chief Vincent Jimno, James Malandra # 243, Robert Benton # 152, Stephen Skuba # 224 and Eric Distel # 196.

Robert S. Wolfe, Eugene P. Ramirez, Steven J. Renick, Manning, Marder and Wolfe, for defendants-appellees City

of Escondido, Vincent Jimno, Corey Moles, and David Reaver and Adlerhorst International, Inc.

Appeal from the United States District Court for the Southern District of California; Napoleon A. Jones, District Judge, Presiding. D.C. No. CV-92- 01970-NAJ.

Before HALL, KOZINSKI and HAWKINS, Circuit Judges.

KOZINSKI, Circuit Judge.

[1] We hold that deadly force under *Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)*, means force reasonably likely to kill.

I.

1992 did not start well for Robert Vera Cruz. After drinking more than two six-packs of beer on New Year's Day, he headed over to the local Del Taco restaurant. The Del Taco employees were cleaning up after closing and refused to serve Vera Cruz, who then challenged them to a fight. When the challenge was declined, Vera Cruz angrily hit the restaurant window and went home.

Just after returning home, Vera Cruz's thirst also returned and so he set out for the liquor store, which happened to be next door to the Del Taco. Before leaving, Vera Cruz strapped a knife to his hip-to protect himself from the Del Taco employees, he explained.

Responding to a call from the said employees, Escondido Police Officer Eric Distel and his K-9 companion were the first to arrive at the scene. Distel spotted Vera Cruz in a doorway at the rear of the Del Taco throwing objects out of the building. When the officer identified himself, Vera Cruz began walking away. Distel

then warned Vera Cruz to stop or he would release the dog; Vera Cruz started running. After giving another warning, Distel released the dog, who bit Vera Cruz on the right arm, bringing him to the ground. After disarming Vera Cruz, Distel ordered the dog to release his bite, and the dog immediately complied. Vera Cruz sustained a large laceration and several puncture *661 wounds on his upper right arm; he required surgery and eight days of hospitalization.

Vera Cruz sued the City of Escondido, its chief of police and several police officers, including Distel, under 42 U.S.C. § 1983, claiming he was the subject of an unreasonable seizure in violation of the Fourth Amendment. The jury found by way of a special verdict that the officer had not used excessive force. Vera Cruz moved for a new trial, arguing that the district court erred in refusing to instruct the jury on the deadly force rule of Garner. The Court there announced that police may only use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others[.]" *471 U.S. at 11, 105 S.Ct. at 1701.* The district court denied the motion, holding that "the evidence presented in this case would not permit a reasonable jury to find that the force applied against the plaintiff was deadly force." Appellant makes various claims; we consider here only the deadly force instruction.[1]

II.

While the Supreme Court in Garner established a special rule concerning deadly force, it did not explain what it

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[1] We address appellant's other claims in an unpublished disposition.

meant by that phrase.[2] In fact, what the phrase means is far from obvious. Given the frailty of the human body, and the wide variety of conditions under which the police must operate, almost any use of force is potentially deadly: A suspect may slip, fall and sustain a lethal head injury, even though the police used only moderate force; a small cut, if left untreated, might become infected and cause death. Yet we do not read Garner as covering all uses of force that might result in death, no matter how remote the possibility. The question is, how likely must death be in order to consider the force deadly?

Vera Cruz urges us to adopt the Model Penal Code's definition of deadly force. According to the MPC, deadly force means "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." Model Penal Code § 3.11(2) (1962) (emphasis added). Vera Cruz argues that he was entitled to a deadly force instruction because he presented evidence that police dogs can cause serious bodily injury.

---

[2] This omission most likely is attributable to the fact there was no doubt in Garner that deadly force had been used because the police had shot and killed the fleeing suspect. Justice O'Connor in dissent expressed concern that the majority's sweeping language "unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk." Id. at 31, 105 S.Ct. at 1711 (O'Connor, J., dissenting). Justice O'Connor also noted that the "Court's opinion, despite its broad language, actually decides only that the shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action." *Id. at 31-32, 105 S.Ct. at 1711-12* (O'Connor, J., dissenting) (emphasis added).

Although we have mentioned the "significant risk of death or serious bodily injury" formulation in three other dogbite cases, we have done so only in dicta. In fact, two of the cases simply refer to the fact that one of our colleagues relied on the MPC in his lonely effort to define deadly force in *Chew v. Gates, 27 F.3d 1432, 1453 & n. 4 (9th Cir.1994) (Norris, J., concurring and dissenting). See Quintanilla v. City of Downey, 84 F.3d 353, 357 (9th Cir.1996)* ("Deadly force has been described as 'force that creates a substantial risk of causing death or serious bodily harm.' " (emphasis added)). The plaintiffs in those cases failed to present any proof that the dogs in question (or police dogs in general) were capable of causing more than "superficial bites" which did not "require serious medical attention." *Quintanilla, 84 F.3d at 358.* Thus, the earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force.

Our case squarely presents this question. Vera Cruz himself required surgery and eight days of hospitalization. At trial, four witnesses testified that such injuries are not unusual; police dogs can--and often do--cause serious harm. One witness testified that he knew of cases where dogs had bitten *662 a person on the face, bitten part of a person's nose off, bitten people in the genitals, and bitten a woman's breasts. At the same time, Vera Cruz presented no evidence that dogbites are likely to result in death. See p. ---- and n. 3 infra. This case, thus, requires us to decide whether force capable of inflicting serious--but not fatal--injuries qualifies as lethal force under Garner.

[2] We now reject the MPC's definition as inapposite to the Fourth Amendment context. The MPC's definition and Garner 's deadly force rule serve entirely different purposes: The MPC is designed to govern criminal liability; Garner's

deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment. We decline to put police doing their jobs in the same category as criminals doing theirs. Because criminal activities serve no legitimate purpose, there is no reason to spare criminals from even remote consequences of their actions; deterrence, by forcing criminals to assume responsibility for all the harm they cause by their anti- social conduct, is the very essence of criminal law. Law enforcement personnel, by contrast, serve important purposes; the risk of personal liability, if taken beyond its pr[illegible] scope, may make police timid and deter activities necessary for our protection. Criminals, moreover, can largely control the circumstances of their crimes and thus minimize the risk that force will be necessary; law enforcement personnel must take the situation as they find it.

The MPC's definition of deadly force is also at loggerheads with Fourth Amendment caselaw. A central consideration under the MPC's definition--the subjective intent of the actor--is an impermissible consideration in the Fourth Amendment context: While it makes perfect sense for criminal law purposes to consider whether "the actor uses [the force] with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury," the question in police brutality cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)* (emphasis added). Moreover, the MPC's formulation, containing the disjunctive "or," would turn the deadly force rule into a "serious bodily injury" rule, rendering Garner 's distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in

Garner.

Other circuits do seem to have adopted the MPC's definitions of deadly force, though none of those cases presented a record like ours. Two of the circuits-- the Tenth in *Ryder v. City of Topeka, 814 F.2d 1412, 1416 n. 11 (10th Cir.1987)*, and the Eleventh in *Pruitt v. City of Montgomery, 771 F.2d 1475, 1479 n. 10 (11th Cir.1985)*--dropped footnotes approving the MPC's definition in dicta. It's not apparent why they did so, since both cases involved shootings, which are clearly deadly force after *Garner*. *See n. 2 supra.* And the Eighth Circuit in *Mattis v. Schnarr, 547 F.2d 1007, 1009 n. 2 (8th Cir.1976)* vacated as moot sub nom. *Ashcroft v. Mattis, 431 U.S. 171 (1977)*, a pre-Garner case, also included the obligatory MPC footnote, but the issue of what constitutes deadly force was not even posed there; the issue, rather, was whether deadly force could be used to stop a fleeing felon who himself had not used deadly force.

The most relevant out-of-circuit case is *Robinette v. Barnes, 854 F.2d 909 (6th Cir.1988)* where the suspect was actually killed by a freakish dog bite. The court there did rely extensively on the MPC's definition, but it focused on the "substantial risk of causing death" prong of the definition, concluding that deadly force was not used because there was no showing that the unusual circumstances which resulted in the suspect's death were foreseeable. *Id. at 912. Robinette* did not consider the "substantial risk of causing ... serious bodily injury" prong of the MPC's definition. Indeed, other language in Robinette suggests that the Sixth Circuit might follow our ruling if presented with an argument like that raised by Vera Cruz: "[T]he mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Id. at 913.*

*663 In short, the out-of-circuit cases, like our own earlier cases, are not very helpful because they did not confront the question presented here. Those courts seem to have seized the MPC's definition for want of anything better, but did not consider--had no reason to consider--how it would apply on a record like ours.

As we read Garner, deadly force is that force which is reasonably likely to cause death. While there are few enough clues in Garner, our interpretation does find support in the Court's reasoning there. First, Garner noted that use of deadly force actually frustrates the interest of the criminal justice system because it's a "self-defeating way of apprehending a suspect.... If successful, it guarantees that [the criminal justice] mechanism will not be set in motion." *471 U.S. at 10, 105 S.Ct. at 1700.* Second, the Court concluded that any law enforcement benefits, such as discouraging escape attempts, don't outweigh a nonviolent suspect's fundamental interest in his own life. *Id. at 10-11, 105 S.Ct. at 1701.* Both of these considerations hinge on the assumption that the use of deadly force threatens a suspect's life. Were this assumption relaxed-say, by positing that deadly force need only cause serious bodily injury-these concerns would be implicated to a far lesser degree and the Court may well have struck the balance differently.

[3] Vera Cruz presented no evidence that properly trained police dogs are reasonably capable of causing death. *See Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702, 706 (9th Cir.1978)* ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is any direct or circumstantial evidence to support it."). In fact, Vera Cruz presented no evidence at trial that police

dogs can kill under any circumstances.[3]

Nevertheless, we will assume that a properly trained police dog could kill a suspect under highly unusual circumstances. The prospect of such an aberration doesn't convert otherwise nondeadly force into deadly force. Robinette--the only reported case where a police dog actually killed a suspect-illustrates our point. In Robinette, the suspect bled to death after a police dog bit him on the neck. Apparently, the dog was trained to bite whatever part of the anatomy was nearest if an arm was unavailable and the suspect had hidden under a car so that only his neck was exposed. *854 F.2d at 912.* The Robinette court held that the use of the dog did not amount to deadly force because the outcome was "an extreme aberration[.]" Id. In judging whether force is deadly, we do not consider the result in a particular case-be it that the suspect was killed or injured-but whether the force used had a reasonable probability of causing death. Were the rule otherwise, all uses of force would be subject to Garner 's deadly force requirements because almost any use of force could cause death under peculiar enough circumstances. To be entitled to a deadly force instruction, a plaintiff must present evidence that the force used, in the circumstances under

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[3] At oral argument before us, plaintiff's counsel stated:

Number one there was testimony as to a number of deaths from police dog attacks. It came from Mr. Bogardus and Dr. Meade. There haven't been many; two or three was their testimony. Secondly, we have the testimony of the capacity of the dog to cause death.

After searching the record, we can find no such reference either to a number of deaths caused by police dogs or to their capacity to kill. Mr. Bogardus did testify about two incidents in which police officers were allegedly killed by suspects after releasing their dogs. R.T. vol. 3, at 409, June 22, 1995.

which it was used, posed more than a remote possibility of death.[4] Because Vera Cruz presented no such evidence, the district court did not err in refusing to give a deadly force instruction.

AFFIRMED.

CONCURRING OPINION

*664 Hawkins, Circuit Judge, concurring:

I concur in the judgment.

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[4] Whether a particular use of force is reasonably likely to cause death is a function of two factors: (1) the degree of force and (2) the accuracy with which it is directed at a vulnerable part of the human anatomy. The greater the force, the less accurately it need be directed to cause death. Thus, a bullet has such killing capacity that it will be deemed lethal if deliberately discharged in the general direction of the victim. But a bullet shot in the air as a warning will not be deemed deadly even if it accidentally hits a tree branch which falls and kills the suspect below.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT L. VERA CRUZ	)	**No. 95-56782**
	)	
Plaintiff-Appellant,	)	D.C.No.CV-92-01970-NAJ
	)	
v.	)	**ORDER AND**
CITY OF ESCONDIDO;	)	**AMENDED OPINION**
VINCENT JIMNO, Chief;	)	
JAMES MALANDRA #243;	)	
ROBERT BENTON #152;	)	
STEPHEN SKUBA #224;	)	
ERIC DISTEL #196;	)	
COREY MOLES, Sgt.;	)	
DOES 1 THROUGH 200,	)	
inclusive,	)	
	)	
Defendant-Appellees.	)	

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted
December 11, 1996 -- Pasadena, California

Filed October 3, 1997
Amended March 31, 1998

Before: Cynthia Holcomb Hall, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Kozinski

ORDER

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The slip opinion filed October 3, 1997, is amended as follows:

page 12804, paragraph 4, line 1	Add "the" between "from" and "said".
page 12806, line 25:	Delete comma after (9th Cir. 1996).
page 12806, at end of line 31:	Insert:

The plaintiffs in those cases failed to present any proof that the dogs in question (or police dogs in general) were capable of causing more than "superficial bites" which did not "require serious medical attention." *Quintanilla*, 84 F.3d at 358. Thus, the earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force.

Our case squarely presents this question. Vera Cruz himself required surgery and eight days of hospitalization. At trial, four witnesses testified that such injuries are not

unusual; police dogs can -- and often do -- cause serious harm. One witness testified that he knew of cases where dogs had bitten a person on the face, bitten part of a person's nose off, bitten people in the genitals, and bitten a woman's breasts. At the same time, Vera Cruz presented no evidence that dogbites are likely to result in death. *See* p. 2927 and n. 3 *infra.* This case, thus, requires us to decide whether force capable of inflicting serious -- but not fatal -- injuries qualifies as lethal force under *Garner.*

page 12806, line 32:	Change "MPC" to MPC's".
page 12806, line 33:	Change "MPC" to "MPC's".
page 12807, line 3:	Change "a" to "as".
page 12807, line 13:	Delete comma after "crimes" Delete "can" between "and" and "thus".
page 12807, line 28:	Change "MPC" to "MPC's".
page 12807, after line 33:	Insert as new paragraphs:

Other circuits do seem to have adopted the MPC's definition of deadly force, though none of those cases presented a record like ours. Two of the circuits -- the Tenth in *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987), and the Eleventh in *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) -- dropped footnotes approving the MPC's definition in dicta.

It's not apparent why they did so, since both cases involved shootings, which are clearly deadly force after *Garner*. *See* n.2 *supra*. And the Eighth Circuit in *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) vacated as moot sub nom. *Ashcroft v. Mattis*, 431 U.S. 171 (1977), a pre-*Garner* case, also included the obligatory MPC footnote, but the issue of what constitutes deadly force was not even posed there; the issue, rather, was whether deadly force could be used to stop a fleeing felon who himself had not used deadly force.

The most relevant out-of-circuit case is *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), where the suspect was actually killed by a freakish dog bite. The court there did rely extensively on the MPC's definition, but it focused on the "substantial risk of causing death" prong of the definition, concluding that deadly force was not used because there was no showing that the unusual circumstances which resulted in the suspect's death were foreseeable. *Id.* at 912. *Robinette* did not consider the "substantial risk of causing ... serious bodily injury" prong of the MPC's definition. Indeed, other language in *Robinette* suggests that the Sixth Circuit might follow our ruling if presented with an argument like that raised by Vera Cruz: "[T]he mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Id.* at 913.

In short, the out-of-circuit cases, like our own earlier cases, are not very helpful because they did not confront the question presented here. Those courts seem to have seized the MPC's definition for want of anything better, but did not consider -- had no reason to consider -- how it would apply on a record like ours.

page 12809, lines 2 & 3:	Delete "v. Barnes, 854 F.2d 909 (6th Cir. 1988)".
page 12809, line 9:	Replace "Id. at 912." with 854 F.2d at 912".
page 12809, lines 11 & 12:	Delete "at 912."

HAWKINS, Circuit Judge, concurring:

I concur in the judgment.

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Robert L. VERA CRUZ	)	**No. 95-56782.**
	)	
Plaintiff-Appellant,	)	D.C.No.CV-92-01970-NAJ
	)	
v.	)	
	)	**MEMORANDUM**
CITY OF ESCONDIDO;	)	
Vincent Jimno, Chief;	)	
James Malandra;	)	
Robert Benton; Stephen Skuba;	)	
Eric Distel; Corey Moles.;	)	
Does 1 through 200, inclusive	)	
	)	
Defendant-Appellees.	)	
	)	

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for the Southern District of California
Napoleon A. Jones, District Judge, Presiding.

Before: HALL, KOZINSKI and HAWKINS, Circuit Judges.
KOZINSKI, Circuit Judge.

Argued and Submitted Dec. 11, 1996.
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Individual who was injured by police dog brought civil rights action against police officer. The United States District Court for the Southern District of California, Napoleon A. Jones, J., entered judgment in favor of officer, and appeal was taken. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) "deadly force," for purpose of

Fourth Amendment restrictions on police conduct, means force reasonably likely to kill, and (2) police officer did not use deadly force in violation of the Fourth Amendment when he used police dog to apprehend a fleeing suspect. Affirmed.

[1] We hold that deadly force under *Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)*, means force reasonably likely to kill.

I

1992 did not start well for Robert Vera Cruz. After drinking more than two six-packs of beer on New Year's Day, he headed over to the local Del Taco restaurant. The Del Taco employees were cleaning up after closing and refused to serve Vera Cruz, who then challenged them to a fight. When the challenge was declined, Vera Cruz angrily hit the restaurant window and went home.

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the ground. After disarming Vera Cruz, Distel ordered the dog to release his bite, and the dog immediately complied. Vera Cruz sustained a large laceration and several puncture wounds on his upper right arm; he required surgery and eight days of hospitalization.

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II

While the Supreme Court in Garner established a special rule concerning deadly force, *1216 it did not

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explain what it meant by that phrase.[2] In fact, what the phrase means is far from obvious. Given the frailty of the human body, and the wide variety of conditions under which the police must operate, almost any use of force is potentially deadly: A suspect may slip, fall and sustain a lethal head injury, even though the police used only moderate force; a small cut, if left untreated, might become infected and cause death. Yet we do not read Garner as covering all uses of force that might result in death, no matter how remote the possibility. The question is, how likely must death be in order to consider the force deadly?

Vera Cruz urges us to adopt the Model Penal Code's definition of deadly force. According to the MPC, deadly force means "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." Model Penal Code § 3.11(2) (1962) (emphasis added). Vera Cruz argues that he was entitled to a deadly force instruction because he presented evidence that police dogs can cause serious bodily injury.

---

[2] This omission most likely is attributable to the fact there was no doubt in Garner that deadly force had been used because the police had shot and killed the fleeing suspect. Justice O'Connor in dissent expressed concern that the majority's sweeping language "unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk." *Id. at 31, 105 S.Ct. at 1711* (O'Connor, J., dissenting). Justice O'Connor also noted that the "Court's opinion, despite its broad language, actually decides only that the shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action." *Id. at 31-32, 105 S.Ct. at 1711-12* (O'Connor, J., dissenting) (emphasis added).

Although we have mentioned the "significant risk of death or serious bodily injury" formulation in three other dogbite cases, we have done so only in dicta. In fact, two of the cases simply refer to the fact that one of our colleagues relied on the MPC in his lonely effort to define deadly force in *Chew v. Gates, 27 F.3d 1432, 1453 & n. 4 (9th Cir.1994) (Norris, J., concurring and dissenting). See Quintanilla v. City of Downey, 84 F.3d 353, 357 (9th Cir.1996)*, ("Deadly force has been described as 'force that creates a substantial risk of causing death or serious bodily harm.' " (emphasis added)) cert. denied, --- *U.S. ----, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997); Fikes v. Cleghorn, 47 F.3d 1011, 1014 (9th Cir.1995)* (deadly force "might be defined as " force that creates a substantial risk of causing death or serious bodily harm (emphasis added)).

[2] We now reject the MPC definition as inapposite to the Fourth Amendment context. The MPC definition and Garner 's deadly force rule serve entirely different purposes: The MPC is designed to govern criminal liability; Garner 's deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment. We decline to put police doing their jobs in the same category as criminals doing theirs. Because criminal activities serve no legitimate purpose, there is no reason to spare criminals from even remote consequences of their actions; deterrence, by forcing criminals to assume responsibility for all the harm they cause by their anti-social conduct, is the very essence of criminal law. Law enforcement personnel, by contrast, serve important purposes; the risk of personal liability, if taken beyond its proper scope, may make police timid and deter activities necessary for our protection. Criminals, moreover, can largely control the circumstances of their crimes, and can thus minimize the risk that force will be necessary; law enforcement personnel must take the situation as they find it.

The MPC's definition of deadly force is also at loggerheads with Fourth Amendment caselaw. A central consideration under the MPC's definition-the subjective intent of the actor-is an impermissible consideration in the Fourth Amendment context: While it makes perfect sense for criminal law purposes to consider whether "the actor uses [the force] with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury," the question in police brutality cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)* (emphasis added). Moreover, the MPC formulation, containing the disjunctive "or," would turn the deadly force *1217 rule into a "serious bodily injury" rule, rendering Garner 's distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in Garner.

As we read Garner, deadly force is that force which is reasonably likely to cause death. While there are few enough clues in Garner, our interpretation does find support in the Court's reasoning there. First, Garner noted that use of deadly force actually frustrates the interest of the criminal justice system because it's a "self-defeating way of apprehending a suspect.... If successful, it guarantees that [the criminal justice] mechanism will not be set in motion." *471 U.S. at 10, 105 S.Ct. at 1700.* Second, the Court concluded that any law enforcement benefits, such as discouraging escape attempts, don't outweigh a nonviolent suspect's fundamental interest in his own life. *Id. at 10-11, 105 S.Ct. at 1701.* Both of these considerations hinge on the assumption that the use of deadly force threatens a suspect's life. Were this assumption relaxed-say, by positing that deadly force need only cause serious bodily

injury-these concerns would be implicated to a far lesser degree and the Court may well have struck the balance differently.

—[3] Vera Cruz presented no evidence that properly trained police dogs are reasonably capable of causing death. *See Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702, 706 (9th Cir.1978)* ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is any direct or circumstantial evidence to support it."). In fact, Vera Cruz presented no evidence at trial that police dogs can kill under any circumstances.[3]

Nevertheless, we will assume that a properly trained police dog could kill a suspect under highly unusual circumstances. The prospect of such an aberration doesn't convert otherwise nondeadly force into deadly force. *Robinette v. Barnes, 854 F.2d 909 (6th Cir.1988)*-the only reported case where a police dog actually killed a suspect-illustrates our point. In Robinette, the suspect bled to death after a police dog bit him on the neck. Apparently, the dog was trained to bite whatever part of the anatomy was nearest if an arm was unavailable and the suspect had hidden under a car so that only his neck was

---

[3] At oral argument before us, plaintiff's counsel stated: Number one there was testimony as to a number of deaths from police dog attacks. It came from Mr. Bogardus and Dr. Meade. There haven't been many; two or three was their testimony. Secondly, we have the testimony of the capacity of the dog to cause death.

After searching the record, we can find no such reference either to a number of deaths caused by police dogs or to their capacity to kill. Mr. Bogardus did testify about two incidents in which police officers were allegedly killed by suspects after releasing their dogs. R.T. vol. 3, at 409, June 22, 1995.

exposed. *Id. at 912.* The Robinette court held that the use of the dog did not amount to deadly force because the outcome was "an extreme aberration [.]" *Id. at 912.* In judging whether force is deadly, we do not consider the result in a particular case-be it that the suspect was killed or injured- but whether the force used had a reasonable probability of causing death. Were the rule otherwise, all uses of force would be subject to Garner 's deadly force requirements because almost any use of force could cause death under peculiar enough circumstances. To be entitled to a deadly force instruction, a plaintiff must present evidence that the force used, in the circumstances under which it was used, posed more than a remote possibility of death.[4] Because Vera Cruz presented no such evidence, the district court did not err in refusing to give a deadly force instruction.

AFFIRMED.

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[4] Whether a particular use of force is reasonably likely to cause death is a function of two factors: (1) the degree of force and (2) the accuracy with which it is directed at a vulnerable part of the human anatomy. The greater the force, the less accurately it need be directed to cause death. Thus, a bullet has such killing capacity that it will be deemed lethal if deliberately discharged in the general direction of the victim. But a bullet shot in the air as a warning will not be deemed deadly even if it accidentally hits a tree branch which falls and kills the suspect below.

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Robert L. VERA CRUZ	)	**NO. 921970J (POR)**
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	**JUDGMENT ON**
	)	**SPECIAL VERDICT**
CITY OF ESCONDIDO;	)	
Vincent Jimno, Chief;	)	
James Malandra;	)	
Robert Benton; Stephen Skuba;	)	
Eric Distel; Corey Moles.;	)	
Does 1 through 200, inclusive	)	
	)	
Defendant-Appellees.	)	
	)	

This matter came on regularly for trial on June 20, 1995, before the Honorable Napoleon Jones, in Courtroom 12 of the United States District Court located at 940 Front Street, San Diego, California. Plaintiff was represented by Attorney Robert Mann, and the Defendants City of Escondido, Vincent Jimno, Eric Distel, Jeff Galindo, Steve Skuba, Robert Benton and Corey Moles were represented by Attorney Mark A. Waggoner.

The jury having been regularly empaneled, heard the evidence, and having been presented with the following special verdict, gave the following responses thereto:

Question No. 1: Do you find that Officer Distel used

excessive force in the apprehension or arrest of Plaintiff?

Answer "yes" or no".

Answer: No.

If you answer Question No. 1 "yes", then proceed to Question No. 2. If you answer Question No. 1 "no" then sign and date this form and return it to the Court.

All individual Defendants having been dismissed before the verdict and the jury having found in favor of the Defendant CITY OF ESCONDIDO.

IT IS THEREFORE ORDERED that judgment be entered in favor of the CITY OF ESCONDIDO and ERIC DISTEL and against the Plaintiff.

IT IS SO ORDERED:

Date: August 2, 1995

/s/ Napoleon Jones
NAPOLEON JONES
District Court Judge

Supreme Court, U.S.
FILED
AUG 26 1998
CLERK

No. 98-41

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERT L. VERA CRUZ,
Petitioner,

v.

CITY OF ESCONDIDO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTION PRESENTED

The "Question Presented" as set out in the Petition for Writ of Certiorari does not properly state either the facts or the law at issue here. Petitioner's formulation of the question presented would be more appropriately stated as follows (italics represent modifications to the petitioner's version):

"Whether the court below erred by holding that the use of a police dog to 'seize' a *violent armed felony* suspect by inflicting *serious, but not life-threatening* bite wounds causing permanent injuries was not 'deadly force' under *Tennessee v. Garner* because it was not force 'reasonably likely to kill,' notwithstanding the fact that the Model Penal Code's definition of 'deadly force' as force creating a 'substantial risk of causing death or serious bodily injury' urged by petitioner has been *alluded to* by every other circuit court to consider *the issue of the proper use of deadly force* and *adopted* by law enforcement agencies across the country as *their operative* definition of 'deadly force.' "

But this "Question Presented" is more fact-specific than the Court of Appeals opinion presently before this Court for review. In light of that, a better formulation of the question presented would be as follows:

In the context of a federal civil rights claim alleging the excessive use of force by a police officer, did the Court of Appeals correctly interpret this Court's decisions in *Tennessee v. Garner* and *Graham v. Connor* to implictly define the term "deadly force" to mean "force reasonably likely to kill", rather than force that "create[s] a substantial risk of causing death or serious bodily injury"? And regardless of the answer, does the rule expressed in *Tennessee v. Garner* even apply where the suspect is *armed*?

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

In addition to the several opinions described by the petitioner in the section of his Petition for Writ of Certiorari entitled "Opinions Below" (at page 1 of the Petition), there are two additional relevant opinions.

One is the District Court's ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, filed on November 27, 1995. (A copy of this order was not included as part of the appendix to the Petition for Writ of Certiorari, but can be found at pages 264-281 of the Appellant's Excerpts of Record [AER] filed in the United States Court of Appeals below.) This order was not published.

The other opinion is the Memorandum decision issued by the Court of Appeals on October 3, 1997 deciding those portions of the appeal which were not resolved in the Court's published opinion at issue here. This Memorandum was, of course, not published.

STATEMENT OF THE CASE

The petitioner, in his Statement of the Case, purports to provide this Court with the factual background of this matter. However, in doing so, he has chosen to present only *his* version of events, ignoring that this case was fully tried and that the jury returned a *defense* verdict. The facts that actually underlie this case, viewed, as they must be, in the light most favorable to the judgment (see *Chesapeake & Ohio Railway Company v. De Atley*, 241 U.S. 310, 311, 36 S.Ct. 564, 564, 60 L.Ed. 1016 (1916)), show the following:

On the evening of January 1, 1992, Officer Eric Distel of the Escondido Police Department was on patrol with his assigned police dog, Artus. At approximately 10:00 PM, he heard a dispatch over his car radio on the main police frequency that a drunk person (petitioner Robert L. Vera Cruz) was trying to break into a Del Taco restaurant and was threatening the employees. (2 RT 179) Shortly thereafter, Officer Distel heard a conversation regarding the incident over a secondary police radio frequency, which reported that the suspect had said that he was going to come back to the Del Taco and that he might have a gun. (2 RT 180)

A little later, Officer Distel received another radio dispatch advising that the petitioner had returned to the Del Taco, that he was "trying to smash in the window, kick in doors. He had been drinking, threatening the employees inside." (2 RT 180-181) Officer Distel immediately responded and arrived at the Del Taco within approximately 30 seconds. He was the first officer to arrive on the scene. (2 RT 182) The petitioner appeared to him to be "ex-

tremely agitated", going into the building and throwing things out. "He appeared to be irate, angry and, quite frankly, violent." (2 RT 186) Officer Distel exited his car, identified himself as a police officer, and told the petitioner to come over to him. (2 RT 186-187) Officer Distel was able to see that the petitioner was wearing a sheath on his belt containing a large knife. (2 RT 187-188) The petitioner then began walking away (2 RT 191), and Officer Distel responded by "yelling for him to stop or I would release the dog." (2 RT 191) The petitioner responded by beginning to run. (2 RT 191)

Officer Distel explained that based on what he had seen the petitioner doing, he had "formed the opinion that I was witnessing a felony [burglary] committed in my presence, an armed felony." (2 RT 190) Furthermore, he had observed that the petitioner "was extremely agitated, obviously violent." He was headed towards an area containing hundreds of units of "duplexes", with lots of "patios, walkways, apartments." (2 RT 194)

> "If he gets in there and had acted as agitated as he was, I have a potential hostage situation. . . . I feared for the safety of the community, and I thought he was going to get away. He was going to get into those apartments. Things were going to get a lot worse real quick." (2 RT 194-195)

So Officer Distel shouted a second warning. When the petitioner continued to run, Officer Distel released his dog. (2 RT 191-192) Artus apprehended the petitioner, and as Officer Distel ran up, he saw the petitioner vigorously trying to pull his arm free from the dog's bite. Officer Distel yelled at him to "quit pulling, stop moving". He then ran up to the petitioner, ripped the knife and sheath off his belt, and threw them to the side. He then grabbed Artus by the collar and verbally and physically ordered him to release his bite. The dog immediately complied, as he had been trained to do. (2 RT 197-198)

Officer Distel then ordered the petitioner to lay down. But instead of complying, the petitioner stood up and began walking away. Officer Distel immediately called for back-up on his portable radio. (2 RT 199) He did this instead of again releasing the dog because, in his mind, that would have been excessive, given that the petitioner was now disarmed and injured. (2 RT 200) A number of additional officers arrived and surrounded the petitioner, who finally stopped and went down to his knees. (2 RT 200-201) Other than the apprehension by the dog, the petitioner was not subjected to any use of physical force by Officer Distel or any other officer. (2 RT 201, 205) The petitioner was placed in a squad car and was immediately taken to Palomar Hospital for treatment for his injury. (2 RT 202)

The petitioner, by his own admission, was drunk at the time of this incident. (3 RT 506) At the hospital, he was asked by a police sergeant what had happened after the dog made contact with him, to which the petitioner replied that he did not remember a dog biting him. He didn't even remember *seeing* the dog or a police officer. In fact, when a nurse asked the petitioner what was wrong with him, he replied "Nothing." (4 RT 741)

The petitioner filed suit on December 22, 1992 in the United States District Court for the Southern District of California against the City of Escondido and various of its police officers. (AER 1) Trial began on June 20, 1995. (1 RT 47-48) On June 30th, the jury unanimously found, by way of special verdict, that Officer Distel had not used excessive force in the apprehension of the petitioner. (7 RT 1227-1228) The petitioner's motion for judgment notwithstanding the verdict, or, in the alternative, for new trial was denied on November 27, 1995. (AER 264-281)

Petitioner appealed and the judgment was affirmed on October 3, 1997. (*Vera Cruz v. City of Escondido,* 126 F.3d 1214 (9th Cir. 1997).) The petitioner's request

for rehearing or a rehearing *en banc* was denied and an amended opinion was issued on March 31, 1998. (*Vera Cruz v. City of Escondido,* 139 F.3d 659 (9th Cir. 1998), superseding the prior opinion.) This Petition for Writ of Certiorari followed.

REASONS FOR DENYING CERTIORARI

I. THERE ARE NO COMPELLING REASONS WHY THIS DECISION SHOULD BE REVIEWED BY THIS COURT

A. There Is No Meaningful Conflict Between *Vera Cruz* And Any Other Appellate Or District Court Decision, Including *Tennessee v. Garner*

Supreme Court Rule 10 describes "the character of the reasons the Court considers" when deciding whether to grant a petition for writ of certiorari. Of the reasons listed, the one on which the petitioner has focused virtually all of his attention (Rule 10(a)) is his claim that the *Vera Cruz* decision conflicts with decisions reached by a number of other federal courts. The petitioner also suggests, although not explicitly, that the Court of Appeals, in its *Vera Cruz* opinion, "has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Rule 10(c)); that is, the plaintiff at least implies that the *Vera Cruz* decision is at odds with this Court's decision in *Tennessee v. Garner,* 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985).

As will be shown in Section IV below, the *Vera Cruz* decision does not conflict with any other appellate or district court decision. While it is true that other Courts of Appeals have utilized, in the context of excessive force claims, a definition of "deadly force" as force that creates a substantial risk of causing death *or* serious bodily injury, none of those courts spent any time analyzing that issue. Rather, each simply used that definition as a starting point for the analysis that was actually at the heart

of the case pending before it. The outcome in those cases would not have changed even if the definition of "deadly force" adopted in *Vera Cruz* had been used. Those courts' use of the "death or serious bodily injury" definition of deadly force simply did not reflect a thorough-going and reasoned analysis of the question.

In addition, as the Court of Appeals made clear in its opinion, and is discussed in Section II below, the *Vera Cruz* definition of deadly force as "force reasonably likely to kill" not only is not at odds with this Court's opinion in *Tennessee v. Garner*, it is compelled by that decision, particularly in light of this Court's later decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

B. The Issue Presented Here Need Not Be Decided By This Court, And In Any Case Is Not Yet Ripe For Review

Rule 10(c) sets out another circumstance under which this Court will consider granting certiorari: where an appellate court "has decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court." There is no dispute that the definition of "deadly force" is an important question, but that alone is not enough to require this Court to accept the issue for review. However important a question may be in the abstract, it must be a question that *should* be settled by this Court. This case does not present such a question.

As the Court of Appeals conclusively showed in *Vera Cruz*, the definition of deadly force set out in that opinion is essential if this Court's decisions in *Tennessee v. Garner* and *Graham v. Connor* are not to be rendered moot. Since the definition naturally flows from the interplay of those two decisions, it is not necessary that this Court take its time to formally settle this issue, since it has, in effect, already done so. (Or, to avoid any possibility of

confusion, this Court could grant certiorari and summarily affirm the judgment of the Court of Appeals.)

This case also does not present a question that should be settled by this Court because it would be premature to do so at this time. The *Vera Cruz* opinion is the *only* one to directly address and analyze the question of what definition of "deadly force" should be used when deciding whether to apply the rule expressed by this Court in *Tennessee v. Garner*. While various of the cases cited by the petitioner have alluded to such a definition (one which admittedly is at odds with that reached by the Court of Appeals in *Vera Cruz*), only one—*Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988)—did anything more than simply mention that definition and move on. And even in *Robinette* (and the one post-*Vera Cruz* case to address the issue, *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998)), the Court of Appeals did not analyze the case law in order to reach its decision, but simply noted the need for a definition and the availability of such a definition from other sources (the Model Penal Code [MPC] in the case of *Robinette*, the Texas Penal Code and the San Antonio Police Department Procedures manual in the case of *Gutierrez*).

An issue that has been meaningfully analyzed in just a single decision is not one which is ripe for definitive review by the Supreme Court. See, e.g., the opinion of Justice Stevens respecting the denial of the petitions for writ of certiorari in *McCray v. New York*, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) and the opinion of Justice Marshall dissenting from the denial of certiorari in *Gilliard v. Mississippi*, 464 U.S. 867, 869, 104 S.Ct. 40, 41, 78 L.Ed.2d 179. A search on Westlaw indicates that so far, *Vera Cruz* has only been cited a single time since being decided, in an unpublished opinion out of the Ninth Circuit. The federal judiciary clearly has not yet had a chance to consider and assimilate the analysis offered by Judge Kozinski and his colleagues on this issue. Once it does, a consensus could well emerge, either

accepting the *Vera Cruz* definition of deadly force (the likely result, given the strength and clarity of its analysis) or, conceivably, rejecting it in favor of one similar to that offered by the petitioner here. Such a consensus would eliminate the need for this Court to itself address the issue.

Even if a conflict did result, the issue would then be more fully developed, enabling this Court to resolve the issue on a foundation consisting of a number of different fact situations and responsive legal analyses, which would obviously assist this Court in its own decision-making.

In short, however important in theory might be the question of the proper definition of deadly force, there simply is no compelling reason why *this* particular decision regarding that question should be reviewed by this Court, and accordingly this Petition for Writ of Certiorari should be denied.

C. Review Is Not Appropriate Here Because Even A Complete Reversal Would Not Change The District Court Judgment

The sole issue before this Court is whether *Vera Cruz* sets out the correct definition of deadly force. But even the adoption by this Court of the petitioner's definition would not change the judgment that was entered against him in the District Court.

It is true, as the petitioner states (Petition, page 6), that the District Court refused to give the jury the deadly force instructions requested by the petitioner, which incorporated the definition advocated by the petitioner here. (Petition, pages 6-8.). But, as the District Judge made clear in his ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL (AER 264-281), his decision was *not* based simply on his use of a definition of deadly force similar to that later adopted in the *Vera Cruz* appellate decision. Rather, Judge Jones

explicitly found that the evidence presented by the petitioner at trial did not justify the giving of deadly force instructions under even the petitioner's definition of deadly force. (AER 272-276)

> "The Court's conclusions may be summarized as follows:
>
> (1) That *Garner's* deadly force rule applies only to force posing substantial risk of resulting death, and the evidence failed to show a substantial risk of resulting death;
>
> (2) Alternatively, that the evidence presented did not merit a deadly force instruction because it failed to show that the probable outcome of a dog using the bite and seize apprehension technique would be serious bodily injury; . . . ." (AER 281)

Petitioner implies throughout his argument that the evidence presented at trial showed that the probable outcome of the use of the dog would be serious bodily injury. However, as the District Court's ruling demonstrates, no such showing was in fact made by the evidence presented by the petitioner at trial. Therefore, even if this Court were to grant certiorari here, and even if it were to completely reject the definition of deadly force set out by the Court of Appeals below and unqualifiedly adopt the definition proposed by the petitioner, it would not result in any change whatsoever to the judgment rendered against the petitioner in the District Court following the return of the jury's defense verdict. Thus, there is no real case or controversy for this Court to decide, and accordingly it should deny the Petition for Writ of Certiorari rather than agree to provide what would amount to an advisory opinion.

D. Regardless Of The Definition Of Deadly Force Used, *Tennessee v. Garner* Does Not Apply To This Case, Unless This Court Chooses To Expand The Scope Of That Decision

This Court's decision in *Tennessee v. Garner* dealt with "the constitutionality of the use of deadly force to prevent the escape of an apparently *unarmed* suspected felon." (471 U.S. at 3, 105 S.Ct. at 1697; emphasis added.) Here, there is no dispute that the petitioner *was* armed, with a large knife. Therefore, on its face, the *Garner* decision has no application here. To apply *Garner* to the present case, particularly if the petitioner's definition of deadly force were to be adopted, would expand the scope of the *Garner* decision, thereby endangering police officers, who would now have to hesitate when confronted by a suspect clearly capable of inflicting serious physical harm. Police work is dangerous enough without insisting that officers wait until they are attacked before being permitted to use even non-lethal force to subdue a suspect.

II. *VERA CRUZ* CORRECTLY INTERPRETS THIS COURT'S DECISIONS IN *TENNESSEE v. GARNER* AND *GRAHAM v. CONNOR*

The petitioner, in Section II of the Petition (at pages 16-20), suggests that the *Vera Cruz* court's definition of deadly force is at odds with this Court's decisions in *Tennessee v. Garner* and *Graham v. Connor*. But the opinion itself makes clear why it is the very interplay between those two cases that *mandates* the definition adopted in *Vera Cruz*. That discussion need not be repeated here, since it is set out so clearly and directly in the excellent opinion authored by Judge Kozinski.

Turning to the contentions made by the petitioner, the main thrust of this portion of the Petition is the petitioner's argument that:

> "Using force likely to cause serious bodily injury . . . amounts to punishment summarily imposed out of proportion to the crime which prompted police intervention. . . . The use of the MPC definition . . . is based on the understanding that the MPC definition best embodies a fundamental proportionality principle embedded in the Fourth Amendment. This principle is implicated when the police use of force is substantially likely to cause serious bodily harm, just as it is implicated by the police use of firearms which are more likely to kill. . . . Any less restrictive standard will ineluctably lead to an increase in deaths and serious physical injuries inflicted by police officers in situations in which the use of such force is not justified." (Petition, pages 17, 18, and 19.)

But the "proportionality" principle discussed by the petitioner was announced by this Court in its decision in *Graham*, not *Garner*,

> "Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, . . ." (*Graham, supra,* 490 U.S. at 395, 109 S.Ct. at 1871; emphasis in original.)

Thus, utilization of the *Vera Cruz* definition of deadly force will in no way encourage police officers to use force out of proportion to that called for by the situation, since *that* is the very definition of excessive force under *Graham v. Connor*. The standard set out by this Court in *Tennessee v. Garner* does not apply generally to all those situations where there is a possibility that the suspect might suffer some sort of unwarranted punishment, but rather covers only the far more limited circumstance where a suspect's life itself is put at risk by the officer's use of force. (See the discussion in *Vera Cruz, supra,* 139 F.3d at 663.)

III. THE MODEL PENAL CODE'S DEFINITION OF DEADLY FORCE SIMPLY WAS NOT INTENDED FOR USE IN CIVIL CASES SUCH AS THIS

A key element of the present Petition for Writ of Certiorari is the petitioner's contention that the Model Penal Code has established a definition for deadly force, and that the *Vera Cruz* decision is out-of-step with both the MPC definition and various federal courts that have allegedly adopted this definition. As will be discussed in Section IV below, the courts in the other cases relied on by the petitioner did not in fact "adopt" the MPC definition. Furthermore, petitioner's reliance on the MPC definition reflects a fundamental misunderstanding of the purpose of the Model Penal Code.

Petitioner is correct in noting that the MPC does offer a definition of "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death *or* serious bodily injury." (Section 3.11(2); emphasis added) (*Model Penal Code: Official Draft and Explanatory Notes* (1985) (American Law Institute, Philadelphia, PA) [hereafter "*MPC Official Draft*"].) But petitioner fails to note the *context* in which that definition is offered.

Section 3.11 is the "Definitions" section for Article 3 of the MPC, entitled "General Principles of Justification". "This article formulates justification for conduct that otherwise would constitute an offense, to the extent that it has seemed feasible to do so in general terms." (*Model Penal Code and Commentaries (Official Draft and Revised Comments)*, Part I, General Provisions, §§ 3.01 to 5.07, page 1 (1985) (American Law Institute, Philadelphia, PA) [hereafter "*MPC Commentaries*"].) The ten other sections of Article 3 provide the details of the affirmative defense of justification to criminal charges. Section 3.07 covers the "Use of Force in Law Enforcement".

It must be remembered that the MPC is a *criminal* code, not a civil code, and that "[t]he main aim of a criminal code is to differentiate conduct that warrants *criminal* sanctions from conduct that does not." (*MPC Commentaries,* page 4; emphasis added.) The drafters were not seeking to establish a civil standard for appropriate conduct (see Section 3.01(2)), and felt free to deviate from those standards when they deemed it appropriate for reasons of "sound legislative policy". (*MPC Commentaries,* page 2.)

The definition of "deadly force" contained in Section 3.11(2) is a unitary definition for *all* of Article 3 of the Code, not just the section dealing with the use of force by police officers. There is nothing in the MPC to indicate that the drafters made a conscious decision to apply the same definition of "deadly force" when referring to force applied by police officers in the course of their duties to force used by criminals in the course of their unlawful activities. And the commentaries to the MPC suggest otherwise.

Section 3.07(2)(b) sets out the MPC's standards for the use of deadly force by police officers. In the drafters' lengthy commentary on this section, a constant refrain is their concern over the use of firearms by law enforcement. (See, e.g., *MPC Commentaries,* page 111 ["*shoot* to prevent the escape"]; page 115 ["reckless use of *firearms*"]; page 116 ["in an age of *firearms*"]; all emphasis added.) And the drafters consistently discussed deadly force as that which would result in the death of the suspect. They noted that the common law rule permitted the "*killing* of a resisting or fleeing felon" because virtually all felonies originally were punishable by death. (*MPC Commentaries,* § 3.07, page 113.) Now, however, "[r]elatively few crimes are punishable by *death.*" (*Ibid.*) They also retreated from the common law rules "that allowed the *killing* of criminals" in order to prevent the commission of crimes (*id.* at 132), finding instead that

"resort to the privilege to *kill* in crime prevention will rarely be necessary." (*Id.* at 133.) (All emphasis added.)

In short, the drafters of the MPC were concerned with actions taken by police officers that might result in the *death* of criminal suspects, and sought to establish principles for the use of such deadly force. And they established these principles in the context of a *criminal* code, to clarify the circumstances under which police officers might be *criminally prosecuted* for their conduct, *not* to establish standards for determining whether they could be held civilly liable for that conduct. As the drafters themselves commented:

> "The police must make a practical and often hasty decision as to whether or not they are dealing with a person who may be a dangerous criminal in the sense of being a threat to life or limb. They are accustomed to making such decisions, and would rarely be *prosecuted* save in the most egregious of situations." (*MPC Commentaries*, § 3.07, page 124; emphasis added.)
>
> "No perfect principle of limitation can be formulated, but Paragraph (iv) [of Section 3.07(2)(b), which authorizes the use of deadly force by police officers to arrest persons suspected of crimes involving the use or threatened use of deadly force, or where the suspect poses a substantial risk of causing death or serious bodily injury if his or her apprehension is delayed,] proceeds from a valid premise and is susceptible of practical administration—the more so since the actor will, on the whole, be justified upon his own belief in the existence of the justifying peril. A challenge to that belief under Section 3.09(2) as reckless or negligent is likely to receive attention or prevail only in cases of extreme abuse, where deadly force is plainly indefensible under the criteria that are set forth." (*Id.* at 121-122, fn. 31.)

As the *Vera Cruz* opinion itself notes: "The MPC's definition and *Garner*'s deadly force rule serve entirely

different purposes: The MPC is designed to govern criminal liability; *Garner*'s deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment." (*Vera Cruz, supra,* 139 F.3d at 662.) The MPC's definition of deadly force simply is not appropriate for cases such as this, and should not be utilized in circumstances for which it was never intended by its drafters.

IV. THERE IS NO MEANINGFUL CONFLICT BETWEEN THE *VERA CRUZ* DECISION AND DECISIONS OF OTHER FEDERAL COURTS

The petitioner cites to a number of decisions reached by various circuit courts of appeals and district courts in an attempt to show that the *Vera Cruz* decision is out-of-step with the prevailing view of the federal judiciary as to the definition of deadly force. Specifically, the petitioner argues that "all of the courts that have previously considered this issue" (Petition, page 11) have adopted the definition of deadly force set out in the Model Penal Code. However, as Judge Kozinski wrote in the *Vera Cruz* opinion, "the out-of-circuit cases, like our own earlier cases, are not very helpful because they did not confront the question presented here." (139 F.3d at 663.) "Thus, the earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force." (*Id.* at 661.) A review of the cases cited by the petitioner shows that, rather than "adopting" the MPC definition, the most that the majority of them did was simply allude to it. "These courts seem to have seized the MPC's definition for want of anything better, but did not consider—had no occasion to consider—how it would apply on a record like ours." (*Id.* at 663.)

A. *Pruitt v. City of Montgomery*

The petitioner inaccurately asserts that the Eleventh Circuit in *Pruitt v. City of Montgomery, Alabama,* 771

F.2d 1475 (11th Cir. 1985) "rejected the definition later advanced by the Ninth Circuit in this case" and that it "held that the Model Penal Code deadly force definition . . . properly defined deadly force". (Petition, page 13.) The footnote which contains the *Pruitt* opinion's entire discussion on this subject does not even refer to a definition of deadly force as "force reasonably likely to kill", much less reject it. The only definition it rejected was one that "suggests that the use of deadly force occurs only when an officer shoots to kill." (*Id.* at 1479, fn. 10.) Such a definition would be at odds with the *Vera Cruz* definition, not just the MPC's, and so it was properly rejected by the *Pruitt* court.

Further, the *Pruitt* court did *not* "adopt" the MPC definition. Rather, it first commented that in *Tennessee v. Garner*, this Court had "adopted in large part" the MPC's deadly force rule—specifically, its abandonment of the common law rule which allowed the use of deadly force against *any* fleeing felony suspect. The court then set out the MPC's definition of deadly force, but *without* specifically finding that the MPC had stated the proper definition of deadly force for constitutional purposes. The court made no effort to analyze whether the MPC definition was in fact the proper one, and simply noted that the actions of the defendant officer (who shot the plaintiff) were "clearly encompass[ed]" by the MPC definition. (*Ibid.*) The court then concluded that the *officer's actions* amounted to "a 'use of deadly force' in the constitutional sense, concluding that such finding is consistent with *Garner.*" (*Ibid.*) Therefore, contrary to the petitioner's miscitation (Petition, page 13), the *Pruitt* court did *not* hold "that the Model Penal Code deadly force definition . . . properly defined deadly force 'in the constitutional sense.' " (Petition, page 13.) In light of all this, it cannot be said that the *Pruitt* decision conflicts with that of *Vera Cruz*.

B. *Robinette v. Barnes*

Similarly, in *Robinette v. Barnes,* 854 F.2d 909 (6th Cir. 1988), which involved the death of a suspect due to his being bitten by a police dog, the Court of Appeals did not "adopt" the MPC definition. The *Robinette* opinion, alone among the decisions cited by the petitioner, does directly confront the fact that this Court, in *Tennessee v. Garner,* "did not expressly define what constitutes deadly force." (*Id.* at 911.) The *Robinette* court, after discussing *Garner,* concludes that "whether deadly force has been used to seize a criminal suspect must be determined in the context of each case." It then notes that the authors of the MPC have "acknowledge[d] this fact in their definition of deadly force," which the Court then sets out. (*Id.* at 912.) But rather than "adopting" this definition, the *Robinette* court simply finds the MPC definition:

> "a useful statement of the *two factors most relevant* to the determination of whether the use of a particular law enforcement tool constitutes deadly force: the *intent* of the officers to inflict death or serious bodily harm and the *probability,* known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a 'substantial risk of causing death or serious bodily harm.'" (*Ibid.*; emphasis added.)

It is true that in that comment, there is the implicit acceptance of the definition of deadly force offered by the MPC—that it is force that creates a " 'substantial risk of causing death or serious bodily harm.' " But the *Robinette* court had no reason to analyze whether that portion of the MPC definition was correct, because:

> "Applying these factors to the present case, we conclude that Barnes did not employ deadly force to apprehend Daniel Briggs . . . [W]e find that the use of properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of

causing death *or* serious bodily harm.' " (*Ibid.*; emphasis added, footnote omitted.)

Since the *Robinette* court found that the use of the police dog did not create a substantial risk of causing *either* death or serious bodily harm, it therefore had no need to determine whether the MPC definition of deadly force was correct in order to reach its ultimate conclusion: that the use of the police dog on this occasion, even though it resulted in the suspect's death, did not amount to the use of deadly force. Thus *Robinette* cannot properly be cited as supporting the MPC's definition of deadly force. At best, all that can be said is that the *Robinette* court did not *reject* that definition. Accordingly, it cannot be said that the *Robinette* decision conflicts with that of *Vera Cruz*.

C. *Matthews v. Jones*

Petitioner cites *Matthews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994) as "reaffirming the validity of the approach in *Robinette* and the use of the Model Penal Code definition of 'deadly force' ". (Petition, page 13.) But like *Robinette*, whose reasoning the *Matthews* court *does* adopt, the *Matthews* decision does not "adopt" the MPC definition of deadly force. Rather, in its rejection of the plaintiff's claim that he was subjected to the use of deadly force when he was bitten by a police dog, the *Matthews* court simply used the MPC definition in the same manner as in the *Robinette* opinion. (*Id.* at 1050-1051.)

The *Matthews* court noted that there was no evidence of any improper training of the dog, no evidence of any intent on the part of the officer to cause death or serious injury, and no evidence to show that the dog was used in an inappropriate manner. (*Id.* at 1051.) And so, just as in *Robinette*, there was no need for the *Matthews* court to analyze whether the MPC definition was too broad, since even under its definition, the plaintiff had not been subjected to deadly force.

Of particular relevance to the issue now before this Court, the *Matthews* court pointed out that "[a]lthough *Robinette* was decided before *Graham*, it was decided under the 'objective reasonableness' standard which the latter requires." (*Ibid.*) In other words, despite the citation in the *Robinette* and *Matthews* decisions to the MPC definition—with its reference to "serious bodily harm"—neither court felt that this Court's decision in *Tennessee v. Garner* was implicated in the case before it. Rather, both courts found that challenges to the use of this type of force simply involve the generalized question of the reasonableness of the amount of force used, as discussed by this Court in *Graham*. Therefore, *Matthews* too is not in conflict with *Vera Cruz*.

D. *Marley v. City of Allentown*

The petitioner asserts that the Third Circuit "affirmed the use of a 'deadly force' instruction based upon the MPC definition" by affirming, *without opinion*, the District Court's ruling in *Marley v. City of Allentown*, 774 F.Supp. 343 (E.D.Pa. 1991). Ignoring the fact that an unpublished affirmance hardly amounts to the adoption of a formal position by a circuit, the *Marley* opinion simply does not say what the petitioner claims. While the opinion, written regarding the District Court's denial of the defendant's motion for judgment notwithstanding the verdict or, in the alternative, for new trial, does reaffirm that the giving of a deadly force instruction was appropriate, the content of that instruction is not discussed *at all* in the opinion. Nor is the MPC even mentioned. So the petitioner had absolutely no basis for his categorical assertion that the Third Circuit had "affirmed the use of a 'deadly force' instruction based upon the MPC definition". Therefore it is clear that *Marley* cannot be cited as a case in conflict with *Vera Cruz*.

E. *Ryder v. City of Topeka*

The petitioner cites to *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 fn.11 (10th Cir. 1987), asserting that

"[t]he *Ryder* court emphasized that 'deadly force does not occur only when the suspect actually dies,' "—which is fully consistent with the *Vera Cruz* definition of deadly force—"and noted that '[s]everal courts have adopted the Model Penal Code definition of deadly force.' " (Petition, page 14.) This accurately states the limited ruling of the *Ryder* court, which did not itself "adopt" the MPC definition. Nor did it offer any analysis of that—or any other—definition. Thus the *Ryder* decision does not conflict with *Vera Cruz*.

F. *Mathis v. Parks*

The petitioner cites *Mathis v. Parks*, 741 F.Supp. 567 (E.D.N.C. 1990), in which the District Court denied a motion to dismiss made on the ground of qualified immunity by the two police officer defendants. The District Judge did not mention the MPC or any specific definition of deadly force, noting simply that "the potential applicability of *Garner's* fourth amendment analysis would be apparent, since a reasonable officer would be aware that a full-force blow delivered to the abdomen using the knee as a blunt instrument *could* constitute deadly force", citing to *Robinette*. (*Id.* at 572; emphasis added.) In a footnote, the District Judge notes that "*Robinette* takes the common-sense approach that objects other than the obviously lethal gun or knife can cause death." (*Id.* at 572 fn. 3.) The footnote concludes with the statement: "Moreover, it is not required that the offending police officer apprehend that death might result; rather, it is only necessary that the officer think his use of force might cause serious bodily harm." (*Ibid.*)

But the District Court's sole support for this last statement is a citation to *Robinette*, and as noted above in Section IV.B., the *Robinette* court did *not* reach the conclusion suggested by the District Judge, because it had not needed to. The *Robinette* decision at most held that *even if* the definition of deadly force were as broad as that suggested by the MPC—i.e. force likely to cause

death *or* serious bodily harm—there was no use of deadly force in the case pending before it. The District Judge was thus overreading *Robinette,* therefore *rendering his* dicta, offered in a footnote, unreliable as authority. Accordingly, *Mathis* too cannot be said to be meaningfully in conflict with *Vera Cruz.*

G. *Mattis v. Schnarr*

The petitioner correctly notes that in *Mattis v. Schnarr,* 547 F.2d 1007, 1009 and fn.2 (8th Cir. 1976), "[t]he Eighth Circuit *employed* the MPC formulation" (Petition, page 14; emphasis added) in order to evaluate the constitutionality of a Missouri statute governing when police officers could use deadly force to effect the arrest of a felony suspect. However, despite that footnote, the decision in fact does *not* adopt the MPC definition. The opinion, written a decade before this Court's decision in *Tennessee v. Garner,* is a bellwether for that opinion, making the same arguments and reaching the same conclusion. As was the case with this Court's decision in *Tennessee v. Garner,* the reason the *Mattis* court found the statute before it to be unconstitutional was not because it allowed police officers to use force that might cause serious bodily harm, as the MPC definition provides, but because it allowed the officers to endanger the *lives* of suspects in circumstances where such force was inherently excessive. "We are concerned with the right of an individual *life.* . . . Clearly, the right to *life* is 'fundamental,' . . ." (*Mattis, supra,* 547 F.2d at 1017; emphasis added.) Accordingly, *Mattis,* which pre-dates both *Garner* and *Graham,* not only does not conflict with *Vera Cruz,* it actually supports the conclusion reached in *Vera Cruz.* (See the discussion regarding *Garner,* and therefore implicitly *Mattis,* in *Vera Cruz, supra,* 139 F.3d at 663.)

H. Ninth Circuit Cases

The petitioner asserts that "[e]ven the Ninth Circuit had previously *supported* the MPC definition of deadly

force as the appropriate standard to determine whether an application of force by the police had to meet the *Tennessee v. Garner* standard." (Petition, page 15; emphasis added.) This assertion was rejected in the *Vera Cruz* decision itself, when the Court of Appeals noted that:

> "Although we have mentioned the 'significant risk of death or serious bodily injury' formulation in three other dogbite cases, we have done so only in dicta. In fact, two of the cases [*Fikes v. Cleghorn*, 47 F.3d 1011, 1014-1015 (9th Cir. 1995) and *Quintanilla v. City of Downey*, 84 F.3d 353, 357-358 (9th Cir. 1996)] simply refer to the fact that one of our colleagues relied on the MPC in his lonely effort to define deadly force in *Chew v. Gates*, 27 F.3d 1432, 1453 & n.4 (9th Cir. 1994) (Norris, J., concurring and dissenting). . . . [These] earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force." (*Vera Cruz, supra*, 139 F.3d at 661.)

The Ninth Circuit as a whole clearly agrees with the *Vera Cruz* court's conclusion that its definition of deadly force is not in conflict with *Chew*, *Fikes*, or *Quintanilla* since the circuit judges as a group rejected the petitioner's request for an *en banc* hearing in this case.

I. Post-*Vera Cruz* Case

The respondent has discovered only a single case decided after the original *Vera Cruz* opinion was issued that touches on the question of the proper definition of deadly force, *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998). In that case, the two defendant police officers "hog-tied" a suspect and placed him in the rear of their patrol car. The plaintiffs alleged that because of the position of the suspect's face when placed in the vehicle, he died of asphyxiation. (*Id.* at 443-444.) The District Court denied the officers' motion for summary judgment, made on the ground of qualified immunity.

The Court of Appeals, after evaluating the evidence, dismissed the interlocutory appeal on the basis that there were material disputes of fact which precluded it from "determining the objective reasonableness of the officers' conduct". (*Id.* at 442.)

In addressing the officers' qualified immunity claim, the appellate court first had to determine whether the right at issue was "clearly established". The court concluded that hog-tying could constitute the use of deadly force, and that the circumstances under which deadly force can be utilized were clearly established. (*Id.* at 446.) In deciding whether hog-tying could constitute deadly force, the *Gutierrez* court naturally cited to this Court's decision in *Tennessee v. Garner,* but then continued that:

> "Although guns represent the paradigmatic example of 'deadly force,' *Garner* failed to address whether other police tools and instruments can also be characterized as 'deadly force.' Lower courts have struggled with whether to characterize various police tools and instruments as 'deadly force.' . . . These courts have generally described 'deadly force' as force 'carry[ing] with it a substantial risk of causing death or serious bodily harm.' *Robinette,* 854 F.2d at 912. Although we have not had occasion to adopt this description, both the Texas [Penal Code] statute and SAPD procedures in effect in November 1994 employed it. . . . Accordingly, we find both the definition of 'deadly force' and *Garner*'s holding to have been clearly established prior to November 1994." (*Ibid.*)

Despite citing to both *Robinette* and *Quintanilla,* the *Gutierrez* court did *not* cite to *Vera Cruz,* even though the original opinion issued in *Vera Cruz* had been issued six months earlier. And, like all of the cases cited by the petitioner, the *Gutierrez* court did not engage in any analysis in coming up with its definition of deadly force (in contrast to what makes up virtually the entire opinion

in *Vera Cruz*). Just as in those other cases, the *Gutierrez* court simply seems to have adopted a definition that was conveniently at hand. (See *Vera Cruz, supra,* 139 F.3d at 663.) And the opinion in *Gutierrez* does not depend on a definition of deadly force that includes as one of its elements the potential for causing "serious bodily harm", rather than just death, since the evidence clearly raised a material factual dispute as to whether hog-tying does present a substantial risk of causing *death,* at least under the circumstances presented to the *Gutierrez* court.

In short, just as with all the cases cited by the petitioner, *Gutierrez* does not meaningfully conflict with *Vera Cruz,* because it presents no analysis explaining or justifying its adoption of a definition of deadly force similar to that advocated by the petitioner here, and because the definition adopted by the court was not necessary to its decision. In fact, in all these cases, including *Gutierrez,* the identical result would have been reached even if each of the courts had utilized a definition similar to that adopted in *Vera Cruz.* Therefore, contrary to the petitioner's sweeping assertion otherwise (at page 11 of his petition), the decision below does not conflict with *any* of the decisions of other circuits that have addressed this issue.

V. THE PETITIONER'S CONCERN ABOUT UPSETTING EXISTING POLICE STANDARDS REGARDING DEADLY FORCE IS NOT A BASIS FOR GRANTING CERTIORARI HERE

The petitioner argues that accepting the *Vera Cruz* definition of deadly force "would undermine the extensive national consensus on the definition of 'deadly force' ". (Petition, pages 16-17.) But the petitioner fails to offer even a suggestion as to where that "consensus" came from. It is probable that that consensus is a reaction to the lack of an authoritative definition of deadly force from the courts, and simply reflects a decision by police

departments to adopt a broad definition in order to protect against possible civil liability. Furthermore, the *criminal* definition of deadly force is something that police officers work with every day, and so what could be more natural than for their departments to adopt *that* definition in the absence of any definitive one in the civil arena?

But even if there is more to the "consensus" than just convenience and fear of lawsuits, that would not be a basis for granting certiorari. The petitioner contends that in *Tennessee v. Garner*, "[t]his Court stressed the relevance of actual department policies in defining the Fourth Amendment limits on the use of force." (Petition, page 16.) But this Court merely stated that it "would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severly hamper effective law enforcement." (*Garner, supra*, 471 U.S. at 19, 105 S.Ct. at 1705.) The opposite sort of situation is presented here.

Here, the rejection of the MPC definition would *not*, as suggested by the plaintiff, "inevitably result in an increase in the incidence of deaths and serious bodily injuries caused by the police in a wide range of police encounters with members of the community" (Petition, page 17), for the simple reason, as discussed in Section II above, that adoption of the *Vera Cruz* definition of deadly force would still not change the fact that this Court's opinion in *Graham v. Connor* precludes the use of *any* sort of force—deadly or not—that is out of proportion to that called for by the situation. Therefore, general adoption of the *Vera Cruz* definition by police departments would *not* cause any change in "police practice[s] of long standing". Thus, the petitioner's apprehension about upsetting existing police standards regarding deadly force does not provide a basis for granting certiorari in this case.

CONCLUSION

The *Vera Cruz* decision has created a bright-line test for when this Court's decision in *Tennessee v. Garner* comes into play. In contrast, the petitioner's "serious bodily harm" formulation contains far too many variables to be workable; for example, it will inevitably result in widely conflicting verdicts by juries presented with virtually identical factual scenarios. To adopt the petitioner's definition is to condemn the federal courts to endless appeals requiring case-by-case determinations of whether a particular use of force, under a specific factual scenario, could, as a matter of law, potentially be considered deadly force. Police officers will be left with no guidance at all, since virtually *any* use of force could be described in hindsight as the application of "deadly" force. A clear standard is needed, and only the *Vera Cruz* definition provides it.

For all these reasons, the respondent urges the Court to deny this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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NO. 98-41

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ROBERT L. VERA CRUZ,
Petitioner,

vs.

CITY OF ESCONDIDO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. INTRODUCTION

Respondent seeks to avoid review by mischaracterizing the factual and procedural record below and the many cases in circuit courts which have employed the Model Penal Code definition of "deadly force" in applying the Fourth Amendment in the context presented by the Petition. Though Respondent enthusiastically embraces the new rule created by the Ninth Circuit in this case, there is no doubt that it is a new rule and is at odds with the holdings and reasoning of many other circuit court opinions.

This Court did not decide the issue presented in either *Tennessee v. Gardner*, 471 U.S. 1 (1985), or *Graham v. Conner*, 490 U.S. 386 (1989); the issue of the proper Fourth Amendment standard to be applied to the mauling of a misdemeanor suspect by a police dog is of considerable national importance and this Court should not accept Respondent's invitation to wait to see if other circuits change their views to apply the new rule created by the Ninth Circuit here. Indeed, there is already evidence, in the only post *Vera Cruz* case, that this conflict will remain. *See Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998).

II. RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Respondent is wrong in arguing that the facts must be viewed in the light most favorable to the defense. The issue is whether petitioner's requested jury instructions on deadly force (Pet. 6-8), should have been given. As the Ninth Circuit recognized, in this procedural context, an appellate court must look at the facts in the record favorable to that theory. Pet. App. 6a. *See Don Burton Inc. v. Aetna Life & Cas. Co.*, 575 F.2d 702, 206 (9th Cir. 1978 ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is

any direct or circumstantial evidence to support it.") In this procedural posture, the facts set forth in the Petition are therefore the relevant universe of facts and not the facts set forth by Respondent to justify the jury's verdict. Thus, the issue on which Petitioner seeks review is squarely presented in this Petition.

Respondent advances two factual propositions in its effort to reframe this case as one in which the question presented is not ripe for review. First, Respondent claims that deadly force may have been justified here under the *Garner* standard, by claiming that because Petitioner wore a sheathed knife on his hip and was intoxicated, he became a felony suspect who presented a danger of death or severe bodily injury to persons in the area. Opp. Cert. 2-3. Second, Respondent argues that Petitioner was not entitled to the deadly force instruction he requested because the record would not support the finding that the use of a police dog to bite and hold a person constitutes force that is reasonably likely to cause serious bodily harm. Respondent simply misconstrues the record on both crucial points.

A. The Record Is Clear That Petitioner Was a Misdemeanor Suspect Who Presented No Risk of Death or Grave Harm to Others

First, the record is clear that on the night in question, Respondent's officers viewed Petitioner as a misdemeanor "drunk and disorderly" suspect. AER 214 (Ex. 83A, transcript of broadcast).

While Petitioner may have carried a sheathed knife on his hip, it was not unlawful to do so. (6/20/95 RT 142:2-5.) Furthermore, at no time did Petitioner reach for the knife, or make any threatening gestures of any kind, nor did Distel hear

any threats. (6/20/95 RT 142:6-142:18.) Indeed, while Respondent tries to raise the spectre of Petitioner as a violent felon against whom even force likely to kill would have been justified, at trial, Distel admitted specifically that he did not have cause to believe that deadly force was justified.[1]

B. The Force Used Was Likely to Cause Substantial Bodily Harm, Thus Squarely Presenting the Issue of What Constitutes "Deadly Force" under *Garner*

Respondent likewise fails in its efforts to argue that this case is not ripe for review due to an alleged failure by Petitioner below to prove that the force used was sufficient to cause serious bodily injury. Opp. Cert. 8-9. This argument flies in the face of the facts as relied upon by the Circuit Court when it reached the decision herein challenged:

> Vera Cruz himself required surgery and eight days of hospitalization. At trial, four witnesses testified that such injuries are not unusual; police dogs can - and often do - cause serious harm. One witness testified that he knew of cases where dogs had bitten a person on the face, bitten part of a person's nose off, bitten people in the genitals, and bitten a woman's breasts." Pet. App. 6a.

Indeed, the Ninth Circuit specifically determined that the facts of this "case squarely presents this question" of

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[1] "Q: At the time you gave the dog the "forahn" command [bite command], you did not have the justification for using lethal force, did you?

A: No, I did not."

I RT 131:8-10, 21-23.

whether "force likely to result in serious injury (but not death) amounted to deadly force." *Id.*

III. THERE IS A CONFLICT IN THE CIRCUITS THIS COURT SHOULD RESOLVE

Respondent attempts to convince the Court that the numerous federal appellate cases that have adopted and applied the Model Penal Code definition of "deadly force" do not truly conflict with the Ninth Circuit's opinion below. Respondent cannot, however, dispute two key points: first, no other court has ever adopted, or even hinted at, Judge Kozinski's definition of "deadly force" or any definition of that term that does not encompass serious bodily injury; second, every other court to face the issue, including the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, has either explicitly adopted, or assumed the correctness of, the definition urged here by Petitioner. Respondent argues that there is "no meaningful conflict" between the Ninth Circuit's decision and other federal case law, because other circuits have "alluded to," rather than "adopted," the MPC definition, and because other courts have not reached the issue presented here. Respondent's argument depends on its painstaking effort to deconstruct each of the opinions that is at odds with the Ninth Circuit's new definition in order to show that other courts have not "adopted" the MPC definition. Respondent does not succeed in this effort because other courts have adopted the MPC definition. In fact, contrary to Respondent's insinuations, Judge Kozinski's opinion itself concedes that "[o]ther circuits do seem to have adopted the MPC's definition of deadly force." *Vera Cruz*, 139 F.3d at 662.

Respondent goes to great lengths to articulate an interpretation of *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985) that makes it appear consistent with *Vera*

Cruz and inconsistent with adoption of the MPC definition of "deadly force." Opp. Cert. 15-16. Respondent fails in this attempt, because *Pruitt* explicitly adopted a "death or serious bodily harm" definition of deadly force. The following quotation from that opinion makes this point conclusively:

> The above-quoted definitions [including the Model Penal Code and the definition set forth in *Mattis* [*v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976)], both setting forth the "substantial risk of causing death or serious bodily harm" standard] clearly encompass Kidd's actions in shooting Pruitt; Kidd, at the least, purposely fired his shots at Pruitt's legs, and in doing so used force capable of causing serious physical injury. We find such action a "use of deadly force" in the constitutional sense, concluding that such finding is consistent with *Garner*."

Pruitt, 771 F.2d at 1480, n.10. Despite Respondent's confusing mischaracterization, *Pruitt* plainly and specifically reached the issue of whether "force capable of causing serious physical injury" is "deadly force" under *Garner*, and answered this question in the affirmative. Moreover, as noted below, the Tenth Circuit in *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987) concluded that *Pruitt* "adopted" the MPC definition; even Judge Kozinski, in his opinion below, noted that the Eleventh Circuit in *Pruitt* "approv[ed]" the MPC's definition." Pet. App. 8a. *Pruitt*'s discussion of the definition of deadly force alone – not to mention the fact that *Pruitt* has been cited in the Tenth Circuit as well for this definition – establishes that the Ninth Circuit's opinion has created a clear inter-circuit conflict.

Respondent's similarly tortured reading of *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) – and its conclusion that "*Robinette* cannot properly be cited as supporting the MPC's definition of deadly force" – also cannot stand even the most casual reading of that decision. Opp. Cert. p.17. The court in *Robinette*, "[a]pplying [the MPC] factors to the present case," found that deadly force was not used because there was no substantial risk of "causing death or serious bodily harm." 854 F.2d at 912. Although – as in any case where a court finds deadly force was not used – the decision was theoretically "consistent" with the Ninth Circuit's new definition, the court in fact adopted and applied the MPC. While the court may have had "no need to determine whether the MPC definition of deadly force was correct" on the facts presented, Opp. Cert. 18, the court nonetheless did accept and adopt this definition. Indeed, at least three other federal appellate courts have cited *Robinette* for the specific proposition that the MPC provides the correct constitutional definition of "deadly force."[2] *Gutierrez v. City of San Antonio*, supra; *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997); *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994).

Other appellate cases demonstrate the depth and breadth of the consensus that the MPC is the authoritative source of the definition of "deadly force." For example, while Respondent – focused on semantics not substance – character-

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[2] Respondent contends as well that the court in *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994) "does not 'adopt' the MPC definition of deadly force." Opp. Cert. 18. In fact, that case makes clear, just as *Robinette* does, that it applies the MPC standard of "substantial risk of causing death or serious bodily harm." 35 F.3d at 1050-51.

izes the court in *Mattis v. Schnarr*, *supra*, as having "employed" rather than "adopted" the MPC definition, the court in fact stated that "[w]e *use* the term ["deadly force"] in this opinion as it is used in the Model Penal Code." *Id.* at 1099 n.2 (emphasis added). As in the other cited cases, the court explicitly adopted the MPC definition, and analyzed the facts of the case before it using that definition. Similarly, in defining "deadly force," the court in *Ryder v. City of Topeka* cited only to the MPC and to cases that it characterized as having "adopted" it. 814 F.2d at 1416-17 n.11. The Seventh Circuit, in *Estate of Phillips v. City of Milwaukee*, *supra*, applied the same definition, citing *Robinette*. 123 F.2d at 593-94.

Finally, contrary to Respondent's characterization of *Gutierrez v. City of Antonio*, *supra*, as a case that "does not meaningfully conflict with *Vera Cruz*," that recent case amply and definitively illustrates the now existing conflict between circuits. The court in *Gutierrez* held that on the facts alleged before it, "hog-tying" a suspect was an act of "deadly force." In so holding, the court adopted a "death or serious bodily harm" standard for the definition of "deadly force" in the Fifth Circuit, and further held that this definition was clearly established prior to November 1994, relying explicitly on the consensus among federal appellate courts adopting the MPC definition, on the MPC provision as codified in the Texas Penal Code, and on the similar provision of the San Antonio Police Department Procedure manual. 139 F.3d at 446. Respondent's contention that "the identical result would have been reached even if [the court] had utilized a definition similar to that adopted in *Vera Cruz*," Opp. Cert. 24, is pure speculation, and is almost certainly incorrect in the factual context presented in *Gutierrez*. More importantly, Respondent misses the point that regardless of whether it would or

could have reached the same result using the Ninth Circuit's new definition, the court did not use or adopt that definition, but instead explicitly adopted the definition urged by Petitioner and applied by all other courts that have had occasion to define "deadly force" in the Fourth Amendment context.

Not only is there a consensus among federal appellate courts as to the applicability of the MPC definition of "deadly force" to the Fourth Amendment context, but several courts have explicitly cited that consensus in applying the definition. *See, e.g., Gutierrez*, 139 F.3d at 446 (*citing, inter alia, Robinette, supra*, and *Estate of Phillips, supra*); *Ryder, supra*, 814 F.2d at 1416 n.11 ("[s]everal courts of appeals have adopted the Model Penal Code definition of deadly force," citing *Pruitt, supra*, and *Mattis, supra*); *Estate of Phillips* (*citing, inter alia, Robinette, supra*). The *Vera Cruz* panel itself recognized this consensus. Pet. App. 8a. Far from "seiz[ing] the MPC's definition for want of something better," these courts – with the exception of the panel that decided *Vera Cruz* – cited and applied the definition that they correctly took to be the operative and normative constitutional standard as applied by other courts and by law enforcement agencies, in light of this Court's decision in *Garner*. Certainly, no court has ever expressed the belief, articulated by Respondent, that the MPC-based definition used by the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits is at odds with this Court's decisions in *Garner* and *Graham*, and that the "interplay" of those decisions compels that Judge Kozinski's definition be used. Opp. Cert. 6. The fact that Respondent finds this conclusion – a conclusion that no other court, including the Fifth Circuit panel that recently decided *Gutierrez*, has even alluded to – in the opinion below, in the face of so many decisions applying the MPC definition, demonstrates both the existence of a clear inter-circuit

conflict, and the need for this Court to decide this important question of federal law.

IV. GARNER AND GRAHAM DO NOT RESOLVE THE ISSUE AT HAND

The Ninth Circuit made clear it was addressing an issue *Garner* left open, namely what is "deadly force" such that the Constitution requires a specific justification for its use; yet, Respondent argues that the issues in this case are effectively decided by *Graham* and *Garner*. Opp. Cert. 10-11. Respondent quotes *Graham*'s language, 490 U.S. at 395, that explained that *Garner*'s analysis should be read to mean that *"all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." Respondent inexplicably derives from that language the conclusion that *Garner* "covers only the far more limited circumstance where a suspect's life itself is put at risk by the officer's use of force." Opp. Cert. 11.

Respondent misses the point. *Garner* does more than announce that unreasonable force by police officers is unconstitutional – it specifies that "deadly force" is per se unreasonable absent probable cause to believe that the person against whom force is used presents a threat of serious physical harm or death to the officer or others. The question here is not whether *Garner* was correct, but what *Garner* meant by "deadly force," a definition that is not found within the text of *Garner* but that is fairly to be found in the reasonableness requirements implied there and made explicit in *Graham*. Anglo-American jurisprudence has long understood force that is likely to maim as being on par as force that is likely to kill – indeed, in California today, aggravated

mayhem is punishable by life in prison. Cal. Penal Code §205. The MPC definition of "deadly force" understood to apply by the circuits that have addressed this question does not knit a definition out of supposition, or even express a normative understanding of how seriously we should view such force. Rather, it expresses a consensus-based understanding of "deadly force." That understanding recognizes force that is reasonably likely to rip off one's triceps (or, as the Ninth Circuit understood, force that has been shown to "bit[e] part of a person's nose off, bit[e] people in the genitals, and bit[e] a woman's breasts") is an extraordinarily serious matter, on par with force that can kill, and should be justified by the same standard as we require in circumstances when we allow officers to use force likely to kill.

CONCLUSION

For all of these reasons, the Petition should be granted.

Respectfully submitted,

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